OGC 69-0294

14 February 1969

Mr. J. Walter Yeagley
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D. C. 20530

Dear Walt:

Enclosed is documentation we have prepared pertinent to S. 782, Senator Ervin's bill. Tab A is a general statement of personnel security and suitability. Tab B points out how S. 782 specifically affects our employee security program and Tab C is the legal memorandum on S. 1035 prepared by the Legislative Attorney, American Law Division, Library of Congress (see clipped page of July 2, 1968 Congressional Record) and our reply to the arguments stated therein. These pretty well set forth the problem.

When you have had a chance to look over this material, I would appreciate hearing from you.

Sincerely,

s/

Lawrence R. Houston
General Counsel

Enclosures

cc: Legislative Counsel
OGC chrono
√subject LEGISLATION S. 782
OGC:LRH:jeb

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**Remarks:** Attached are two background papers on the Ervin bill which we propose to pass to a few key friends and allies on the Hill who have indicated willingness to support us and who have requested backup material for this purpose.

To LRH
Looks O.K. to me.

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# CIA - PERSONNEL SECURITY AND SUITABILITY

The Agency has special responsibility to ensure the loyalty, security consciousness, integrity and psychological stability of its employees:

a. Soviet and other hostile services assign overriding priority to penetrating U.S. intelligence organs by identifying and exploiting personal vulnerabilities and weaknesses of our personnel.

b. Such penetration can enable the enemy to identify and neutralize our own intelligence operations; learn what we know, and don't know, about enemy capabilities and intentions; gain insights enabling the enemy to confuse and deceive us; and provide vital information about U.S. national policy, military capabilities, technology, etc., with which Agency personnel often become familiar in the course of their routine work.

c. Intelligence personnel are not only an attractive target for the enemy, but in many respects a particularly accessible one. Unlike members of most Government organizations, intelligence personnel often must carry out their demanding and sometimes dangerous assignments completely alone and in hostile areas. They are thus subject to severe psychological pressures. They

are far removed from immediate supervision, or even observation by friendly colleagues. In these circumstances any latent vulnerabilities and instabilities in their character or loyalty may come to the surface and be detected and exploited by an ever alert enemy.

d. The only protection against these hazards is a careful and thorough assessment of the individual to ensure the selection of the right man for the job.

e. This is essential not only in the interest of the Agency and the Government, but in that of the individual as well. Many people, through no fault of their own, are subject to latent weaknesses and vulnerabilities of one sort or another, and we believe it would be a great disservice to them to impose upon them burdens for which they are unfitted, perhaps leading to unfortunate consequences for them as well as for the Agency.

2. Hence we have over the years, with the best professional advice available, devised a system of medical and psychological tests and security checks designed to identify potential problems in these fields before they can cause serious damage. In a sense these tests may be compared with the thorough assessments employed in the selection of jet pilots and astronauts--too much is at stake to take chances with avoidable human error or weakness.




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3. In the past there have been all too many cases where sensitive agencies of both the U.S. and other free world governments have suffered massive damage precisely because latent human weaknesses of individuals in key positions were detected and exploited by our enemies: several cases a few years back seriously disrupted the effectiveness of NSA; the British Intelligence Service has still not recovered from the effects of the Philby, Blake and other cases; the Germans, French and Swedes, among others, have had similar experiences; and even now an intensive investigation is taking place in Brussels to determine the damage to NATO security resulting from a recent espionage case there.

4. In sum, CIA's procedures for ensuring the security and suitability of its personnel have been developed over the years on the basis of the Agency's specialized knowledge of the aims and methods of the opposition, the importance and sensitivity of the Agency's responsibilities, the best available professional advice, and the cumulative practical experience of over two decades of Agency management. These procedures have, with only the rarest exceptions, had the full understanding and support of Agency personnel. Any major changes in these procedures should be adopted only after a most careful examination of the possible consequences.



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S. 782 - Specific Problems Affecting the Central Intelligence Agency

Section 1(b), while commendably protecting an employee from compulsory attendance at meetings and lectures on matters unrelated to his official duties, would, for example, make it unlawful for any department or agency to "take notice" of the attendance of one of its employees at a meeting held by a subversive group or organization. While it is doubted that this is the intent of the bill, it clearly is one of the effects of Section 1(b).

Section 1(d), in making it unlawful to require an employee to make any report of his activities or undertakings not related to the performance of official duties, is similar in its effect to Section 1(b). It poses the question of whether the Agency, having discovered that one of its employees is in regular and unreported contact with an intelligence agent or official of a foreign government, would be violating the law in asking the employee for an explanation of this relationship, particularly in the case in which the employee's official duties do not relate to matters involving that particular foreign government. Further, this Section is in conflict with a long-established policy that employees of the Agency must obtain prior approval in making public speeches or writing for publication.


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These and additional restrictions are established to prevent the inadvertent disclosure of sensitive intelligence through employee activities or undertakings not related to official duties. Here again the question arises whether the Agency would be violating the law in exerting control over these activities.

Section 1 (e) deals with psychological testing. S. 782 authorizes the Directors of the FBI, NSA and CIA, or their designees, on the basis of a personal finding in each individual case, to use such tests for the purpose of inquiring into the sensitive areas of religious beliefs and practices, personal family relationships, and sexual attitudes, but it denies the use of such testing to all other departments and agencies without regard to the fact that employees of these departments and agencies may be regular recipients of highly classified information.

Section 1 (f) establishes the same prohibition on the use of the polygraph test as applies to psychological testing, and grants the same partial exemption to the FBI, NSA and CIA. Again, the use of the polygraph test in the proscribed areas is denied to all but these three agencies, irrespective of the fact that highly sensitive positions may be involved.



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Section 1(k) poses a problem for the Agency in that it would appear to require the presence of counsel in behalf of an employee as soon as and at the very moment that a supervisor were to ask the employee the reasons for some suspected dereliction of duty ranging from a serious security violation to tardiness in reporting for duty or sloppy work habits. This provision goes to the very heart of the continuous process of review of intelligence operations and activities to determine their effectiveness, the quality of information derived, and professionalism in which the activities were conducted. Out of such interviews or postmortems there naturally evolves the review of individual employee performance which, if unsatisfactory, can readily result in disciplinary action. A great many extremely sensitive intelligence operations and activities are involved in this process and the presence of private counsel in behalf of an employee would raise most serious questions as to the appropriate control and protection of the intelligence information involved. There is no desire that an employee should be deprived of the right of counsel when appropriate, but the wording of this Section would make it "unlawful" to ask the simple preliminary questions which are necessary to establish whether or not there is some failure in performance or dereliction of duty unless provision is made for the presence of counsel if requested by the employee.

Section 4 of the bill would permit any employee or applicant who alleges that an officer of the Executive Branch has violated or threatened to violate provisions of the Act to bring civil action in the district courts. Communist or other subversives acting on their own or on instructions from foreign agents, could file suits for the sole purpose of harassment based on allegations of improper questioning during recruitment interviews. A concerted effort of this nature could seriously impair the orderly recruitment process of the Agency. The will and ability of small minorities to interrupt the normal functioning of both public and private institutions has been amply demonstrated in recent months. There is little doubt that such groups would be quick to recognize and exploit the weapon provided by this Section of the bill.

Section 5. The comments made with respect to Section 4 above are only to a slightly lesser extent equally applicable to Section 5.

Section 6. This Section grants a partial exemption to the FBI, NSA and CIA with regard to financial disclosure and the use of psychological and polygraph testing by requiring each of the Directors, or their designees, to make a personal finding with regard to each individual case that such testing or financial



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disclosure is required to protect the national security. If the Agency is to comply with the spirit of the law, it will still be necessary that a personal finding be made in each individual case that such testing or financial disclosure is required to protect the national security. Inquiry by these means into the proscribed areas, which are the key areas of vulnerability, will not be possible as a matter of general regulation.

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5 September 1968

Legal Effect of S. 1035 on the Intelligence Activities of CIA

1. A memorandum by the American Law Division of the Library of Congress, dated January 29, 1968, concerning the effect of S. 1035 on the Central Intelligence Agency has been recently filed in the Congressional Record (Cong. Rec., 2 July 1968, pp. S8088 and S8089) after being presented to the Senate Subcommittee on Constitutional Rights.

2. The author of the article has conducted considerable research into the statutes which have a bearing on the Agency and its functions. He also cites several cases which have a bearing on the applicability of various laws and legal principles to the functions of intelligence. Unfortunately, however, the author has not had the same opportunity to research the sensitivities of security agencies generally or of Central Intelligence Agency, specifically. It is the purpose of this paper to acquaint those interested in the subject with the actual issues involved and with certain court rulings in other, perhaps lesser known, legal proceedings. This discussion demonstrates that there are inherent in S. 1035 conflicts with statutes and in fact conflicts with judicial concepts of the necessity for secrecy in intelligence matters.

3. The article refers to a number of statutory provisions which it claims were designed to allow CIA to maintain secrecy concerning its operations and personnel. It cites 50 U.S.C. 403(d)(3) as authorizing the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. That statute places a responsibility on the Director of Central Intelligence for protection of intelligence sources and methods but in fact arms him with no authority to carry out that responsibility.

4. Although 50 U.S.C. 403(d)(3) provides no authority to the Director of Central Intelligence for carrying out the obligation which it places upon him to protect intelligence sources and methods, the Supreme Court has steadfastly held to the view that intelligence is a very special subject. As was stated in the Totten case (Totten v. United States, 92 U.S. 105 (1876)):

> "...all secret employments of the Government in time of war or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our Government in its public duties, or endanger the person or injure the character of the agent..." cannot be disclosed in a court of law. "A secret service, with liability to publicity in this way, would be impossible;... The secrecy which such





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contracts (of employment) impose precludes any action for their enforcement... It may be stated that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential... greater reason exists for the application of the principle (of not allowing disputes involving state secrets to be aired in court) to cases of contract for secret service with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed."

The Totten case has been repeatedly cited with approval by the Supreme Court. (The most recent case concerning government privileges decided by the Supreme Court was United States v. Reynolds, 345 U.S. 1 (1953) in which Totten was favorably cited. 97 L. ed. 729, 732, 733, 735.)

5. Any suit filed before a court charging a violation of S.1035 would inevitably require assertion of the facts tending to support the violation. These facts are inextricably involved with Agency functions and operations and identities of Agency personnel. On the other hand 50 U.S.C. 403g[section 6 of the CIA Act of 1949, as amended] specifically exempts the Agency from the provisions of any law requiring publication or disclosure of the Agency organizatio functions, names, official titles, salaries, or numbers of personnel employed by the Agency. For example, if an employee stationed abroad



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asserted in court a violation of S. 1035 by his superior, the mere identification of the Agency personnel could reveal classified information in violation of the secrecy oath which all employees are required to take, and in itself would be a breach of security contrary to the interests of the United States and possibly endangering lives of people.

6. This then is the crux of the issue--if the CIA is to be subject to suits to prove its innocence or the innocence of one of its officers, as provided in S. 1035, all efforts to maintain the security of its operations become an exercise in futility. It is apparent that when a court action is maintainable concerning the performance of a service for the Government, despite the secrecy required to perform that service, then the service becomes useless because secrecy is its essence. A mere appearance in court could result in possible disclosure of names and employment relationships, the very existence of which are state secrets. If any employee has a statutory right to a court hearing of his grievance, no matter how wrong or how frivolous his suit may be and no matter how strong the case for the CIA is, once that suit is filed a great disservice has been done to the integrity of the Agency's security system and to its ability to operate anonymously, for the public examination into the grievance is a serious breach of security and in many cases may prove hazardous to the lives of certain classes of Agency employees. It must also be noted when discussing facts which may be revealed in court that it is a determination of the court in any given case as to whether a

particular fact is privileged or is a state secret so that it may be withheld. In other words, if the CIA is sued under section 4 of S. 1035 and the name of any employee who is germane to the case is considered by the Agency to be secret information, it becomes the judge's decision whether that name will be revealed. (United States v. Reynolds, 345 U.S. 1 (1953) ) (Government privilege annotated in 95 L. ed. 425, 97 L. ed. 735)

7. Under S. 1035 an employee or applicant who felt he had been aggrieved could go into court alleging a violation of S. 1035. The case would then be subject to the jurisdiction of the court. The problems which this would pose are best demonstrated by a recent case in which a suit was brought against the Agency by the widow of an applicant for employment. Her husband was being considered for Agency employment and went through the normal applicant processing. As a result of a regular medical examination, he was informed that his blood pressure was unacceptably high and that if he would bring it under control his case would be reviewed. A few days later he committed suicide. His wife brought suit against the Agency in a Federal court claiming that during the processing drugs had been administered to her husband which had so depressed him that his suicide resulted. No drugs of any sort are administered in Agency processing and the suit was obviously spurious. To prepare for a defense, however, it was necessary to obtain affidavits from those members of the Office of Security, Office of Personnel and Office of Medical Services who had been in any way involved in the processing.



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The very filing of these affidavits in open court would have caused the "publication" of "functions, names [and] official titles" of certain CIA personnel--the very information which the Congress sought to protect by section 6 of the Central Intelligence Agency Act of 1949, as amended. The association of a number of these employees with the Agency was itself classified, and one of the doctors who was on his way to a very sensitive overseas assignment had to be recalled. Another doctor was also slated for such an assignment, which had to be held in abeyance. The widow's lawyer realized, on seeing the affidavits, that he had no case and advised her to withdraw the suit. A less ethical lawyer or a client bound on harrassment of CIA could have forced production of the affidavits in open court. This is just one of a number of cases which could be recited wherein the appearance of an employee or the production of information in judicial procedures resulted or could have resulted in security disclosures detrimental to the national security.

8. These actual cases indicate that once subject to the jurisdiction of a court, the Agency cannot guarantee protection of its sensitive information, particularly as to sources and methods. In a democratic society there will obviously be vital situations where the desirability for protecting sensitive intelligence information may, of necessity, be subordinated to the preservation of justice. On the other



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hand, intelligence sources and methods should not be subjected to compromise, by design or otherwise, by a statute which would tend to encourage employees in sensitive positions to jeopardize the security system which they are working to protect. In point of fact, our concern lies not so much with the possibility of revelations by CIA employees but rather by the use which may be made of this administrative remedy by those who seek to destroy our national security systems. If such a statute were applied to CIA, the Agency would be faced with one of two alternatives: to remain silent in the face of charges and concede the merits, or to contest the merits and give away the information which the Director is charged by law to protect.

9. The fact is that although the CIA has some statutory authority (and a clear statutory responsibility) to protect its secret information, these mandates are not always enough when the Agency is brought into court. The obvious question then becomes how much further will the Agency be either harassed frivolously or sued in earnest and damaged under the provisions of S. 1035? It is apparent that while the cases to date show serious compromise of classified information under present protective statutes, the probable compromise in the future would be substantially more because of statutory authorizations of suits against the CIA.

10. The American Law Division's report concedes the possibility of conflict between Section 4 of S. 1035 and the Director's authority to terminate employees (50 U. S. C. 403(c)). That authority has been



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upheld in a number of cases where the individual has sought to contest his termination, Kochan v. Dulles, Civ. No. 2728-58, D. C. D. C. (1959), and Torpats v. McCone, 300 F. 2d 914 (1962), U. S. Court of Appeals for D. C. Circuit. Particularly in the Torpats case the court refused to allow on the record information concerning intelligence operations which the plaintiff knew were classified. Our experience has shown however that a court proceeding cannot be confined solely to the matter of a single allegation, but that all sorts of peripheral and background matters are inevitably brought forward. S. 1035 would virtually force the courts to explore these areas publicly.

11. Possibly an even more clear-cut conflict involves section 201(c) of the CIA Retirement Act of 1964 (P. L. 88-643). That provision states that any determinations made by the Director authorized under the provisions of the CIA Retirement and Disability Act of 1964 "shall be deemed to be final and conclusive and not subject to review by any court." This provision was included in the law because the CIA retirement system covers those employees engaged in the most sensitive work of the Agency, primarily overseas activities, and the committees of the House and the Senate which held hearings on the Act realized the serious harm that would result from a public airing of any such cases.

12. As a hypothetical case, consider an employee who is mandatorily placed in a retired status under the CIA Retirement Act by the Director. Assume further that the employee brings an action in a district court



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claiming that his retirement resulted from an interrogation concerning misconduct during which he requested and was refused counsel (section 1(k) of S. 1035). Under the provisions of section 4, the employee would be authorized to maintain the action, and the court would review in detail circumstances of the forced retirement. Such a review by the courts would directly conflict with section 201(c) of the CIA Retirement Act, and would result in a public airing of sensitive information which that section was designed to protect. Since S. 1035 would be the later-enacted law, a court might hold that section 4 prevailed over the provisions of the CIA Retirement Act.

13. The requirement of presence of counsel or other person provided for in section 1(k) of S. 1035 would impose a particularly difficult dilemma. In effect, that section provides that before an employee could be subject to an interrogation which could lead to a disciplinary action, he has the right of counsel or other person of his choice. This statutory requirement could be extremely burdensome administratively. Of more importance, in the case of this Agency where classified information inevitably would be involved, there would be the requirement of investigation of the counsel or other person chosen. If for some reason the counsel or other person were determined to be untrustworthy to receive classified information, the Agency would be in a serious dilemma under S. 1035. On the one hand, it has the responsibility to protect intelligence sources and methods, and on



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the other hand there is the requirement in S.1035 that counsel or other person be present. In theory then, if the Agency refused to permit the presence of the person designated by the employee during the interrogation which involves the classified information, the complaining employee could allege violation of S.1035 in deprivation of his rights. This is a serious infringement of the Agency's ability to protect classified information.

14. As indicated above, experience has shown that most every court action poses serious problems for the Agency. In order that the processes of law may go forward, there is some dilution of matters that should remain secret. The very concepts of S.1035 in granting rights to employees and applicants to sue and to name individual employees of the Agency as defendants is at the outset inconsistent with the purposes behind the various exemptions granted the Agency to maintain secrecy, as well as the responsibility of the Director to protect intelligence sources and methods. These new rights granted employees of the Agency are furthermore inconsistent with the judicial concepts of protecting state secrets and the special nature of employment in secret activities. On balance, we believe that the desirability of protecting sensitive intelligence information far outweighs the need for relief of the type provided by S.1035 to CIA employees who generally have accepted as a condition of employment the necessity for protecting that information. For these reasons, we believe that a complete exemption from this legislation for this Agency is essential.





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his visitors with the latest opinion polls. His predecessor's attack on the Eisenhower administration was centered on statistical comparisons of economic growth and missile stockpiles. Many moons will pass before Robert McNamara lives down the image of a human computer. Sargent Shriver, while head of the OEO, would unfailingly report on the number of families "rescued from poverty."

VALUE OF STATISTICS

The distinguished secretary of HEW has gone so far as to assert that the chief statistician of the department and his staff "do more to determine future HEW programs than all the other officials in the deparment." (Up to now, however, Wilbur has stopped short of promoting himself to chief statistician.)

I, myself, coming from the obscurity of academic life, was startled to discover that I was "good copy" because I had jurisdiction over the figures on inflation, unemployment, etc. I obtained more mileage from stale and mediocre ideas, presumably backed with statistics, than I ever had derived from fresh and brilliant ideas when I was younger. To the amusement of my colleagues and the gratification of my wife, I was often described as "the nation's leading expert" on subjects where, in fact, I had little expertise. Because of a strong passion for anonymity, known best to my immediate superior, I strove manfully to keep my name out of the public print. It was, I confess, a losing struggle.

If this overblown affinity for statistics were only amusing, it would not deserve much comment in a city replete with absurdities. But the phenomenon has a more sober aspect. Government officials are prone to take statistics too literally, to ignore their limitations, and to confuse partial truths with the whole truth about complex realities. This propensity can lead to serious, even tragic, consequences.

DISTRICT OF COLUMBIA ISSUES VAST

I think I can explain the peculiar function of statistics in the Washington milieu. The issues which come here are vast, intricate, ambiguous, intractable. Statistics enable us to grasp and describe these many-sided problems at the cost of heroic over-simplification. One or two dimensions, which happen to be measurable, serve as a shadow representation of something with numerous, perhaps innumerable, dimensions.

No harm is done if a quantitative measure is seen for what it really is. But trouble sets in when the statistical abstraction is confused with the more complex underlying reality. There are two principal dangers in this process. First, immeasurable aspects of the problem may be vastly more important than the measurable. Second, the validity of a particular measure may have been undermined by economic and social changes.

Meanwhile, bemused by the appearance of objectivity and precision, the policy maker keeps his eye fixed on charts and tables which are sadly incomplete, increasing obsolescent, or both. Eventually he comes to believe that poverty really is a condition of having less than $3300 income; that war in Vietnam really is a matter of body counts and kill ratios; and that full employment really is a situation where the national unemployment rate is 4 per cent or less.

OFFICIALS FOOL THEMSELVES

This shadow replaces substance. The ultimate hazard is not that the officials fool the public, but that they fool themselves. After all, they are more inclined to swallow their own rhetoric than the public is.

I should like to dwell briefly on the three examples just noted.

Poverty.—Statistics tell us there is less poverty in America than ever before. The number of poor families has fallen from 8.3 million in 1960 to 5.6 million in 1967. OEO has said that we can look forward to the complete abolition of poverty by the year 1976. Imagine that—a country with no poverty. Truly a historic "first" in the history of social statistics.

With the poverty problem well on its way toward solution, no wonder Secretary Freeman was so irritated by the CBS documentary on "Hunger in America." No wonder the government has been taken aback and caught unprepared by the increasing militancy of the poor. The shock becomes greater when it is realized that only one group among the poor, the urban Negroes, has yet become radicalized to any significant extent. Rural whites and Negroes, Mexican-Americans, Puerto Ricans, and Indians are still relatively apathetic.

The trouble is that the government claims to measure poverty by the number of families with incomes of less than $3300 in current purchasing power, adjusted for differences in family size and urban or rural location. An income cutoff is a useful statistic for many purposes, but a terribly simple-minded definition of poverty. Poverty is shame, guilt and despair; lack of access to good schools or decent housing; being preyed on by criminals; and many other conditions not necessarily cured by family incomes over $3300. Remember that the bulk of families in Harlem are "non-poor."

VIETNAM

For many months we were winning the war in Vietnam—not as quickly as originally hoped, but steadily and inexorably. All the statistics told us so—the body counts, kill ratios, infiltration estimates, bombing data, captured weapons, content analysis of captured documents, and so on. Then it appeared we were not winning.

Is it a coincidence that the most elaborately measured war in American history is also the least successful?

I do not think so. On the contrary, the egregious abuse of statistics contributed directly and substantially to the outcome. Some of the statistics were pulled out of the air, it is true, and some of the interpretations were palpably absurd, e.g., the claim that 2,000,000 refugees had "voted for freedom with their feet." But the major vice was the assumption that the basic elements in the war were those incidents of military might which could be counted, calculated, and computerized.

Had this calculus of force not yielded such ample and comforting food for thought, would it have been possible to disregard so flagrantly all the crucial factors which could not be computerized? Science has worked many wonders, but has not yet put history on the computer, nor ideology, religion, color, colonialism, nationalism sectionalism, cynicism. Since these could not be quantified, they never found their way into the accounts.

FULL EMPLOYMENT

We have been enjoying full employment for two and a half years. We know this because a national unemployment rate of 4 per cent is the official definition of full employment. The rate has been running below 4 per cent except for a brief period in 1967, and currently stands at 3.5 per cent.

And yet it appears that the most important social problem is that of jobs. If we have full employment, how come we need more jobs?

The short answer is that rising expectations have rendered the old measures obsolete.

The full employment concept is related to the scope of the government's responsibility under the Employment Act. Until recently, full employment of primary breadwinners, especially married men, was viewed as the principal obligation. At an overall rate of 4 per cent, most married men do have jobs. [illegible] unemployment [illegible] centrated among women, teenagers, and unmarried men, and the responsibility is broadening to include them. Surely there is no need to belabor the importance of Negro unemployment, though it has only a marginal effect on the national rate.

This misuse of statistics leads to results ranging from the comical to the tragic. What practical lessons are to be learned?

First, of course, we need more and better statistics in order to illuminate the problems more adequately.

Second, statistics must be interpreted with greater skill and discretion. Administrators should not be permitted to confuse them with complex, elusive realities or regard them as significant entities in their own right.

Third, extreme care must be taken lest program budgeting became a Procrustean bed and cost-benefit analysis a crown of thorns. Specious quantification of the unquantifiable can be as mischievous as ignoring it. The peculiar genius of the human brain is that, unlike the present generation of computers, it can deal with qualitative issues in their own right.

Finally, there is no substitute for the intuitive feel of a problem resulting from first-hand exposure to it. This is particularly true for people in Washington, a governmental company town insulated from much that goes on in the world.

Statistics are indispensable, but they cannot remedy the isolation from reality which has beset rulers in all times and places.

## EMPLOYEE RIGHTS AND INVASIONS OF PRIVACY—S. 1035

Mr. ERVIN. Mr. President, I ask unanimous consent to have printed in the RECORD the text of a statement which I presented today before the House Post Office and Civil Service Subcommittee on Manpower and Civil Service, which is presently considering S. 1035, the employee privacy bill passed by the Senate last September. Since, due to the pressure of House business, the subcommittee was unable to hear the entire statement, I have submitted it for the hearing record and am including it here for the benefit of those Members who may wish to study it before the next session of the subcommittee.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

CONSTITUTIONAL RIGHTS OF EMPLOYEES OF THE EXECUTIVE BRANCH AND UNWARRANTED INVASION OF PRIVACY

(Statement by U.S. Senator SAM J. ERVIN, JR., Democrat of North Carolina, on S. 1035 and related legislation before the House Post Office and Civil Service Subcommittee on Manpower and Civil Service, July 2, 1968)

Mr. Chairman, I appreciate the opportunity to appear before this Subcommittee and discuss the need for your favorable consideration of S. 1035..

This measure is designed to protect the civilian employees of the Executive branch in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasion of their privacy.

I introduced this bill because I was convinced that some of the practices and attitudes displayed by the Federal Government are threatening constitutional guarantees which are essential to free men.

As this Subcommittee well knows, complaints have been received by Congress for years that employees do not enjoy due process and other rights equally with all other citizens.

Recently, as the Federal Government has [illegible] chunks of the eco-

public sector, citizens who work for it in any degree have been subjected to economic coercion to surrender their liberties for purposes which have no reasonable relationship to the needs of government. These liberties do, however, have a significant relationship to the health of our free society. If three million Federal employees and their families can be forced to surrender them without any recourse to the courts, then they can be surrendered by millions of State and local employees. Since the attitudes and practices of the Federal Government are emulated by private industries and organizations, the injustices and tyrannies against employees ignored by Congress today will spell the destruction of basic liberties tomorrow.

S. 1035 does not begin to cure all of the injustices and petty tyrannies to which employees are subject. Rather, it deals with specific instances of violations of First Amendment rights of the citizen who may apply for Federal employment or who may work for government.

It specifically protects that individual in the enjoyment of his freedom of conscience, of his right to speak or not to speak about personal matters; to participate or not to praticipate in the political, economic and social life of his community, free of pressure from the Civil Service Commission or from his supervisor.

It assures that they can keep to themselves what they believe or feel about religion, sex, or family relationships or what they do or do not do in their private lives. It assures also that they will never be forced as free citizens to become the unwilling instruments for imposing unauthorized political, social or economic goals of some administration which happens to be in power at the time in Washington.

In an era dominated not only by scientific technology but by the need for rapid and efficient decision-making on a grand scale, S. 1035 is a means of reconciling the needs of government with the individual's right to retain certain areas of his thoughts, beliefs, words and actions, free of unwarranted interference.

It is needed now. If the present trends in the Federal Government are any indication, it will be more vitally needed in the future.

This measure does not affect the power of the Executive branch to deal with employees within the proper confines of the employment relations. Nor, unfortunately, does it limit the harassments and mule-headed thinking displayed in the course of daily work life.

It leaves untouched the vast investigative apparatus of the Federal Government except that they can't harass employees directly with questions about their religion, personal family relations, personal finances, sexual attitudes and conduct. In the case of the latter, if they have specific information of misconduct they can present it to the employee and give him a chance to rebut it. They have extensive power to dismiss probationary employees with no notice, no confrontation, no stipulated reason, and no appeal rights.

There are numerous conflict of interest statutes. There are broadly-worded laws for safeguarding security information, for withholding information, and for apprehending persons suspected of violating these laws. This bill does not affect the administration of these laws nor the authority of Federal managers to manage the operations of government.

The arrogance displayed by the Executive branch toward its employees is illustrated by this form I received recently from a civil servant. It says an employee can't even buy a loaf of bread in a Post Exchange without signing a statement in advance that "I agree to a search of my person, vehicle or any conveyance under my control at any time, anywhere within the confines of Clark Air Base."

About this form, one employee writes: "I object strongly to this arbitrary abridgement of my civil rights. While the measure is intended as a means of black market control, I believe there are legal means of reaching the same end. I hope you will express my objections to the proper authorities."

Then there is the authority which the Civil Service Commission claims under the Freedom of Information Act. It claims the power to deny a personnel specialist in a large non-Defense Department a security clearance, even though he served in the Armed Forces and had worked at a military installation with a clearance. It tells him that investigators were informed by unnamed persons that he has two friends with "questionable mannerisms."

Then they say he had no right to appeal because they merely moved him to a non-classified position. When I asked the Commission to investigate their complaint and review procedures in this area, they replied with a classic statement of their view of their power to deny due process and withhold information. They claimed that Congress has endorsed this attitude by passing the Freedom of Information Act containing exemptions for revealing information given to the government in confidence, or covering law enforcement, or relating to "national defense or foreign policy." Yet, nowhere had the Commission accused the individual of such charges or related their findings to these specific matters.

Asserting the power to withhold all information of this character, the General Counsel informed the Constitutional Rights Subcommittee:

There is no doubt that the confidentiality we think proper denies persons the ability to confront witnesses who gave unfavorable testimony, and we are aware that this lack of either confrontation or full disclosure is often discussed in 'due process' terms. However, we see no way that effective investigations are possible without the pledge and practice of confidence, and we believe any 'due process' question in this situation is muted by the fact that no court decision has ever recognized an employee's entitlement to full disclosure in the precise situation presented here.

The new General Counsel claims that no question of "due process" arises in these cases because no court decision has recognized an employee's rights in such cases.

This is the response Congress receives time and time again when members bring violations of basic rights to the attention of the departments or agencies.

It has always been my understanding of our constitutional system that "due process is synonymous with fair play."

But this attitude of the Executive branch on routine employment matters is precisely why S. 1035 is urgently needed to protect civil servants in certain basic liberties they possess as citizens.

Why the Executive department officials are so reluctant to see this limited protection extended to every civil servant is beyond my understanding.

Yet, in the face of a 79 to 4 vote of approval for this bill in the Senate, in the light of widespread public support from Federal employees and citizens throughout the country, these officials feel they should continue their battle in the halls of the House of Representatives.

The order has gone out to kill S. 1035, and we can only marvel at the equanimity with which the Administration's troops have carried out their orders. For several weeks during these hearings, they have obediently marched up Capitol Hill and back down, leaving, I fear, a wake of half-truths, misconceptions and innuendos about this employee rights legislation. They have conjured up bizarre hypothetical cases. They have raised spectres they are afraid to present in public hearings, and, in effect, they have tried everything from guerrilla warfare to nuclear attacks on S. 1035.

Their strategy is all too clear: They have declared all-out war on any effective measures to protect employee rights. They are obviously determined to beat back any Congressional offensive against the tyrannies of the Executive branch. I submit that Congress must not yield. Contrary to what representatives of the Executive branch would have us believe, we are dealing here with matters much broader than the narrow issue of personnel practices. These are issues of constitutional rights and fair play which touch the heart of our system of government. How they are decided will affect our concepts of American citizenship and the very fabric of our free democratic society.

It is not the business of the politicians in the Executive branch to determine what shall be the public rights of all American citizens. These men are merely charged temporarily—for the length of their particular tenure in office—with the administration of the laws.

Why should the fate of measures protecting basic rights of all citizens be dictated by the personal whims and the skillful lobbying of a Deputy Director of Defense for Civilian Personnel Policy, or an Assistant General Counsel for Manpower, or a deputy director of the National Security Agency, or a chairman of the Civil Service Commission?

It is clear that the bureaucrats will use any means to achieve their goals in Congress.

The Chairman of the Civil Service Commission, for instance, has made a blatant appeal to public concern over civil disorder and law enforcement problems. He had the audacity to equate the desire of Executive Branch employees for additional protections in their enjoyment of their constitutional rights and their personal privacy with disrespect for law and authority displayed by certain individuals in our society.

Mr. Macy performed an amazing feat of obliterating the real issues and focusing on imaginary problems. His aim obviously is to detract from the essential justice accorded by S. 1035. Using the old legal tactic of "confess and avoid," he makes the startling and frank admission that there are other rights which need protecting and that S. 1035 should not be passed because it does not go far enough.

That there are many other violations of basic rights which need correcting goes without saying, of course. Any member of Congress can testify to the fashions in bureaucratic follies he must contend with in trying to help his constituents.

We can heartily encourage the Commission's attempt to identify these problems and to seek administrative and legislative remedies for them. I for one will be happy to support additional measures, and I am sure there are several million civil servants who will be only too happy to assist in the task of describing the problems.

Meanwhile, it is important to make a start. Mr. Macy and his Federal battalions think that if legislation is to be enacted it would be enough to state that an employee possesses general rights and that officials should recognize and protect these "to the maximum extent consistent with law and with the responsibilities of employment in the public service." He therefore endorses H.R. 17760, introduced by the Chairman of this Subcommittee.

This bill not only would retain the status quo and reinforce the present evils perpetrated under existing law: Its language can be used to justify further restrictions on the freedom of employees as private citizens.

H.R. 17760 is distinguished by its lack of recognition of the realities of life in the Federal Service. It appears to be premised on the idea that a citizen's rights cannot be spelled out without jeopardizing the govern-



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ment. It presupposes a government of men, not of laws.

There are significant differences between these two proposals, S. 1035 and H.R. 17760.

That difference is *action*. And it is an intellectual commitment to the idea that constitutional principles can be applied to employees.

It is illustrated by the titles. S. 1035 would *protect* specific constitutional rights and *prevent* specific unwarranted invasions of privacy. It provides remedies for specific violations. It calls for enforcement of rights through court action or through a Board on Employees' Rights.

H.R. 17760 protects no rights; it provides no remedies. It provides no Board on Employees' Rights. It affords no access to the courts. Without specific remedies, and without specific rights, that bill is, as one expert in Civil Service matters termed it, "a feeble litany of pious hopes."

For instance, this measure states that employees have "the right to be protected against any unwarranted invasion of personal privacy." It does not specify what type of privacy.

It further states that employees have "the right of free speech, association and assembly compatible with his Government employment." Well, the Constitution already provides for those protections and there is no caveat concerning government employment. Our purpose is to protect guaranteed rights—not codify limitations on them.

Certainly these are vague standards for protecting constitutional rights.

The bill then lists a number of obligations of employees, including "the obligation to conduct his personal affairs so as not to reflect adversely on the Government as his employer."

An employee's efforts to obtain recourse might be fruitless under the Henderson bill. It provides, for instance, that an employee may file a grievance with his agency and may appeal the decision to the Commission.

Furthermore, if an official has "cause to believe that an employee has not honored *one of the obligations* he owes either to the government as his employer or to an official charged with administrative or supervisory responsibility, he shall take corrective action."

In keeping with its orientation, the bill is open-ended, leaving the Commission power to issue regulations defining "such additional rights and obligations as it determines are necessary to implement fully the policy in the bill." An employee under this bill would never be sure what rights or remedies he possessed.

As one commentator on the Civil Service analyzed it:

It's interesting that the Henderson bill stresses as strongly the obligations employes owe their bosses as the obligations managers owe employes. No one argues that federal employes don't have obligations to the government and their employers, but these obligations are already spelled out in various laws, including the possible penalty of dismissal if those obligations aren't adhered to.

Many of the violations covered in S. 1035 are caused by the action or inaction of the Commission itself, or are based on Executive orders, or more important, are simply beyond the political influence or the administrative capacities of the Civil Service Commission. How can the Commission be expected to judge its own policy decisions? As the agent of the President, it is bound to defend its own actions and the legality of Presidential orders.

The Civil Service Commission blows hot and cold. They don't know what they want.

First, they say there is no need for S. 1035 and that they can take care of any complaints.

Then, Mr. Macy says he is reluctant to see S. 1035 enacted because it is too specific and does not go far enough. At the same time, he decries the expense of a Board whose members would be paid on a per diem basis and only when they are working.

Apparently, he anticipates an extraordinary case load from people who feel they can obtain no satisfaction from the Commission. Likewise, he looks for a heavy judicial burden on the courts if S. 1035 is enacted. The courts would be "flooded," according to the Commission.

We can only draw the conclusion that things are much worse than we thought they were.

If the Commission and agencies obey this law, the Board on Employees' Rights and the courts will never get a case.

The Commission says the Board will "usurp" its power.

S. 1035 in no way limits the Commission's power to perform its assignment in the area of personnel management, and to investigate and resolve complaints from employees. I sometimes have grave doubts about their ability to deal with routine employee problems, much less the important ones in S. 1035. But there is nothing in the bill to prevent an employee from going through the complaint machinery of the agency or the Commission.

For instance, the National Association of Government Employees reported that at the Navy Submarine Base at New London, employees received a notice of the arrival of Civil Service Inspectors. They were told:

The inspectors shall be available to receive any information employees believe should be brought to the attention of the Commission. However, they will not be in a position to take action with regard to individual grievances or other problems of an individual nature. Inspectors will, however, use the information in conducting the inspection, in evaluating the personnel program and in deciding on corrective actions required. Employees are invited, if they so desire, to talk with the inspectors during their visit.

Despite this rather limited concern of the inspector, one employee availed herself of the invitation to discuss personnel problems with the inspectors. Her union officer wrote:

After much debate and roadblocks thrown in her way by IRO, she managed to meet with the Commission representative. On her return from this meeting, she was immediately grabbed by her supervisor, who demanded to know why she went there and what she told them.

After the "third degree" she was marched into the office of the Commanding Officer's assistant, and again was interrogated as to why she went to the Civil Service Commission and what she said to them. This is an invasion of privacy and a serious violation of regulations.

In this case, the regional Commission office, after an official complaint from the union, only reiterated its policy that employees are free to communicate with Civil Service Commission representatives.

ARMY MAP SERVICE CASE

If the Commission had sufficient resources and initiative or inclination to review denials of due process and fair play, there would not be the public indignation over cases like that of the new college graduate who was employed in the competitive service by the Army Map Service and given a secret clearance. Then to obtain higher clearance she was subjected to an extensive personal interview preliminary to undergoing a lie-detector test. She had to sign a form saying she was doing this voluntarily. She was told she would have to answer the same questions when strapped to the polygraph machine. The inquiry ranged from religious beliefs, her politics, to whether she took birth control pills. Then she was called in and told by the security officer, with the personnel officer acquiescing, that investigation showed she was "immoral" and could not retain her clearance. She was pressured to resign and told the information would be in her file for a hundred years. They cited reports from some unnamed people in her apartment building about visits from her boyfriend, the fact that he had a key to her apartment and that they were heard arguing. When she took the matter to the complaint section of the Civil Service Commission, she was told it was outside their jurisdiction and that she should see the personnel office at Army Map Service. Needless to say, she received no information or assistance from that office.

Only after she gave her story to the press and it appeared on front pages of newspapers throughout the country, only after the Civil Liberties Union intervened, and the Constitutional Rights Subcommittee asked for an investigation of the methods used, only then was action taken at the highest level.

Recently, the Department of Defense informed me that it had reviewed her case and found that revocation of her security clearance and her resignation "were unwarranted by the circumstances." She was also informed by the Army General Counsel that the action vacating her clearance revocation leaves her in the position of never having had her security clearance revoked, and that she should respond in the negative if ever asked whether she has been fired or forced to resign from a job.

Under Secretary of the Army David McGiffert has also reported that the Army is currently "undertaking a review of procedures and investigative techniques presently used in connection with the denial, suspension or revocation of security clearances with respect to all personnel, both civilian and military."

This was only one case. It is repeated time and time again, and employees and applicants are intimidated by signed forms supposedly waiving their rights, or by the consequences of the widespread publicity necessary to win their case.

SPECIFIC GUARANTEES IN S. 1035

I think it is high time we focused on just what S. 1035 will do for constitutional rights and employee privacy.

In contrast to the platitudes in H.R. 17760, S. 1035 specifically prohibits requirements or requests to disclose race, religion, or national origin, or that of any of his forebears.

Employees were harassed for months with orders to fill out IBM cards with such information. This was only halted after S. 1035 was introduced and they saw Congress meant business. At least they said early last year that they stopped this nonsense and would use visual surveys instead to acquire the data.

Meanwhile, of course, the information was put into federal computers to accompany or precede every personnel action. Apparently, these questionnaires are still in use. I received this card last month from an employee who was up for promotion and has refused to complete the first card in 1966. Evidently, the data on his tape was not complete. He was required to reveal information about his race and national origin.

One employee was told that a survey of religion would be next.

What the federal government gets away with on federal employees, they will try on private citizens. Private businesses, for instance, have been told by the Labor Department to produce information about the religion of employees and to look for guidance to the experience of the federal government in tabulating civil servants. I think it will be very difficult for them to tell a Presbyterian by the way he parts his hair. If we are truly operating a merit system in the Civil Service, these things have nothing to do with a person's qualification for a job. No individual should be compelled to reveal this information about himself.

The second section of S. 1035 makes it illegal to state or intimate to any civil em-



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ployee "that any notice will be taken of his attendance or lack of attendance at any assemblage, discussion, or lecture held or called by any officer of the executive branch, or by any outside parties or organizations to advise, instruct, or indoctrinate any civilian employee in respect to any matter or subject other than the performance of official duties to which he is or may be assigned in the department or agency, or the development of skills, knowledge, or abilities which qualify him for the performance of such duties."

This language is directed at employee complaints of brainwashing sessions by consultants and guest lecturers on such matters as the cold war, the United Nations, sociological and economic issues. In some instances, attendance was required; in others, attendance was voluntary, but a list of those attending was maintained.

No man in a free society should be subjected to such governmental control over his thoughts.

An example of improper on-the-job indoctrination of employees about sociological and political matters was cited in his testimony by John Griner, president of the AFL–CIO affiliated American Federation of Government Employees:

One instance of disregard of individual rights of employees as well as responsibility to the taxpayers, which has come to my attention, seems to illustrate the objectives of subsections (b), (c), and (d), of section 1 of the Ervin bill. It happened at a large field installation under the Department of Defense.

The office chief called meetings of different groups of employees throughout the day * * *. A recording was played while employees listened about 30 minutes. It was supposedly a speech made at a university, which went deeply into the importance of integration of the races in this country. There was discussion of the United Nations—what a great thing it was—and how there never could be another world war. The person who reported this incident made this comment:

"Think of the taxpayers' money used that day to hear that record." I think that speaks for itself.

* * * * *

With one complaint of attempted indoctrination of employees at a Federal installation, a civil servant enclosed a memorandum taken from a bulletin board stating the time, place, and date of a lecture by a sociology professor on the subject of the importance of racial integration. Attendance was to be voluntary but the notice stated that a record would be made of those attending or not attending.

* * * * *

A third section makes it illegal to require or request any employee "to participate in any way in any activities or undertakings unless such activities or undertakings are related to the performance of official duties to which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties."

Section (c) protects a basic constitutional right of the individual employee to be free of official pressure on him to engage in any civic or political activity or undertaking which might involve him as a private citizen, but which has no relation to his Federal employment. It preserves his freedom of thought and expression, including his right to keep silent, or to remain inactive.

Senate Report No. 534 and the hearings on the bill provide examples of this form of coercion.

One of these is contained in this letter:

"DEAR SENATOR ———: On ———, 1966, a group of Treasury Department administrators were called to Miami for a conference led by ———, Treasury Personel Officer, with regard to new revisions in Chapter 713 of the Treasury Personnel Manual."

Over the years the Treasury Department has placed special emphasis on the hiring of Negroes under the equal employment opportunity program, and considerable progress in that regard has been made. However, the emphasis of the present conference was that our efforts in the field of equal employment opportunity have not been sufficient. Under the leadership of President Johnson and based on his strong statement with regard to the need for direct action to cure the basic causes leading to discrimination, the Treasury Department has now issued specific instructions requiring all supervisors and line managers to become actively and aggressively involved in the total civil rights problem.

The requirements laid down by chapter 713 and its appendix include participation in such groups as the Urban League, NAACP, etc. (these are named specifically) and involvement in the total community action program, including open housing, integration of schools, etc.

The policies laid down in this regulation, as verbally explained by the Treasury representatives at the conference, go far beyond any concept of employee personnel responsibility previously expressed. In essence, this regulation requires every Treasury manager or supervisor to become a social worker, both during his official hours and on his own time. This was only tangentially referred to in the regulation and its appendages, but was brought out forcefully in verbal statements by Mr. ——— and ———. Frankly, this is tremendously disturbing to me and to many of the other persons with whom I have discussed the matter. We do not deny the need for strong action in the field of civil rights, but we do sincerely question the authority of our Government to lay out requirements to be met on our own time which are repugnant to our personal beliefs and desires.

The question was asked as to what disciplinary measures would be taken against individuals declining to participate in these community action programs. The reply was given by the equal employment officer, that such refusal would constitute an undesirable work attitude bordering on insubordination and should at the very least be reflected on the annual efficiency rating of the employee.

The principles expressed in these regulations and in this conference strike me as being of highly dangerous potential. If we, who have no connection with welfare or social programs, can be required to take time from our full-time responsibilities in our particular agencies and from the hours normally reserved for our own refreshment and recreation to work toward integration of white neighborhoods, integration of schools by artificial means, and to train Negroes who have not availed themselves of the public schooling available, then it would seem quite possible that under other leadership, we could be required to perform other actions which would actually be detrimental to the interests of our Nation.

Section (d) is closely allied to the previous section. It prohibits requirements or requests by an agency official that an employee of the agency make any report concerning any of his activities or undertakings unless they "are related to the performance of official duties to which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties, or unless there is reason to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties."

* * * * *

Testifying on the issue of reporting outside activities, the American Civil Liberties Union representative commented:

To the extent that individuals are apprehensive they are going to have to, at some future time, tell the Government about what organizations they have belonged to or been associated with, that is going to inhibit them in their willingness to explore all kinds of ideas, their willingness to hear speakers, their willingness to do all kinds of things. That has almost as deadening an effect on free speech in a democracy as if the opportunities were actually cut off.

The feeling of inhibition which these kinds of questions cause is as dangerous, it seems to me, as if the Government were making actual edicts.

Witnesses gave other examples of invasion of employees' private lives which would be halted by passage of the bill.

In the southwest a division chief dispatched a buck slip to his group supervisors demanding: "the names * * * of employees * * * who are participating in any activities including such things as: PTA in integrated schools, sports activities which are intersocial, and such things as Great Books discussion groups which have integrated memberships."

* * * * *

In a Washington office of the Department of Defense, a branch chief by telephone asked supervisors to obtain from employees the names of any organizations they belonged to. The purpose apparently was to obtain invitations for Federal Government officials to speak before such organizations.

* * * * *

Reports have come to the subcommittee that the Federal Maritime Commission, pursuant to civil service regulations, requested employees to participate in community activities to improve the employability of minority groups, and to report to the chairman any outside activities.

* * * * *

In addition to such directives, many other instances involving this type of restriction have come to the attention of the subcommittee over a period of years. For example, some agencies have either prohibited flatly, or required employees to report, all contacts, social or otherwise, with Members of Congress or congressional staff members. In many cases reported to the subcommittee, officials have taken reprisals against employees who communicated with their Congressmen and have issued directives threatening such action.

* * * * *

The Civil Service Commission on its Form 85 for non-sensitive positions requires an individual to list: "Organizations with which affiliated (past and present) other than religious or political organizations or those with religious or political affiliations (if none, so state)."

* * * * *

You will see that page 18 of the Senate report contains examples of this type of pressure on employees to report to supervisors what they are doing in their local communities to further integration, help poor people, beautify the city and promote other goals of the Administration in Washington, or report any contacts with members of Congress.

INTERVIEWS AND TESTS

Section 1(c) is meant to preserve an inviolate area of personal privacy for the individual working for government or the applicant who is thinking of working for it.

This is an essential guarantee in an era when our lives are beginning to be dominated by hungry computers, when the experts in science and technology daily are making unreviewed decisions about people's lives. This section prohibits an official of a department or agency from requiring or requesting or attempting to require or request any civilian employee or any person applying for employ-



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ment "to submit to any interrogation or examination or to take any psychological test which is designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters."

There is a proviso "That nothing contained in this subsection shall be construed to prevent a physician from eliciting such information or authorizing such tests in the diagnosis or treatment of any civilian employee or applicant where he deems such information necessary to enable him to determine whether or not such individual is suffering from mental illness."

Another proviso assures that this section shall not be construed to prevent an official from advising the employee or applicant of a specific charge of sexual misconduct made against that person and affording him an opportunity to refute the charge.

This should limit some of the broad fishing expeditions conducted by officials in some agencies.

The American Federation of Government Employees has provided an example of some of the nonsense the Marine Corps inflicts on clerk-stenographers who apply for jobs with them which require a security clearance.

A young lady went for an interview for a position and after discussing the job description with her, the supervisor asked her to take the "Frederick Test for Emotional Maturity." That test included such questions as:

1. Do you like and enjoy solitude?
2. Do you enjoy a sweet and peaceful family relationship?
3. Have you ever wanted to murder anyone or commit suicide?
4. Do you live beyond your means?
5. Do you get depressed easily and often; have moods or spells of depression?
6. Are you capable of intense hate for any one person?
7. Do you get angry easily and often, temper tantrums?
8. Do you take offense easily at things people say?

The supervisor told her this was given to all of the applicants and asked her not to reveal that she took the test.

President Griner of the American Federation of Government Employees urged the Army to stop using the test. I think his comment was appropriate. He said:

This is one of the most absurd, ridiculous and unbelievable misuses of a test that has ever come to our attention. It is an outright invasion of privacy and has no possible connection with the position for which the employee applied, nor for that matter any other position.

This bill will stop the State Department from subjecting college applicants for summer jobs to such interviews as that experienced by an 18-year-old girl who told her Congressman that in the course of an interview with a department investigator, she was asked wide-ranging personal question. For instance, regarding a boy whom she was dating, she was asked questions which denoted assumptions made by the investigator, such as:

"Did he abuse you?

"Did he do anything unnatural with you? You didn't get pregnant, did you?

"There's kissing, petting, and intercourse, and after that, did he force you to do anything to him, or did he do anything to you?"

The State Department informed me they have the authority under Executive Order 10450 to do this to all applicants, since all of its positions are sensitive.

Something similar occurred to a prominent attorney who was asked to serve as a legal consultant to an intergovernmental committee. He reports:

"I was asked whether I'd ever had any homosexual experiences.

"I was asked whether I'd ever smoked marihuana, or any of my friends or associates had.

"I was asked whether I'd ever seen a psychiatrist or psychologist and the reasons why I had.

"I was finally asked to tell about anything I or my family had ever done which I was ashamed of.

"The interviewer made me feel sick. That is, I felt he was mentally sick and that he was trying to infect me with this sickness.

"At no time had I been told I would be asked such questions; at no time was I advised I need not answer them; at all times I was made to feel answers were required at the risk otherwise of not being given the job and of being labeled a security risk."

NASA has engaged in similar shenanigans. Some time ago, newly-hired research professionals were told to complete a long "biographical information inventory" at their convenience and to return it to the personnel office within 10 days. They were told the answers would have no effect on their work status although the scores will be related to their "future work performance"—(small comfort, indeed).

They were asked to select answers to such questions as the following:

To what extent did you have feelings of doubt about your intellectual abilities during your childhood and adolescence?

(A) To a great extent; (B) To some extent; (C) To a small extent; (D) Not at all; (E) Was not particularly aware of my intellectual abilities.

At what age did you start dating the opposite sex as a fairly regular part of your social life?

(A) Under 14; (B) 14 to 16; (C) 17 to 20; (D) 21 or over; (E) Never.

To what extent did you "play the field" rather than going out with only one girl at a time?

(A) "Played the field" to a great extent; (B) To some extent; (C) To a small extent; (D) Not at all.

Approximately how old were you when you first fell in love?

(A) Under 7 years old; (B) 8 to 12; (C) 13 to 17; (D) 18 or over; (E) Never did, or don't remember.

During your childhood did you make tree houses and/or build caves?

(A) Yes; (B) No.

During your childhood and early youth, how often did you attend church?

(A) Weekly; (B) Frequently; (C) Occasionally; (D) Barely; (E) Never.

Which statement best describes the family seating arrangement for meals in your childhood?

(A) Fixed arrangement that never varied; (B) Varied rarely; (C) Varied occasionally; (D) There was no arrangement, just sat where we liked.

How would you describe the marital happiness of your parents while you were growing up?

(A) Very happy; (B) Happy; (C) Moderately happy; (D) Rather unhappy; (E) Unhappy.

To what extent were your parents affectionate toward each other?

(A) To a very great extent; (B) To a great extent; (C) To some extent; (D) To a small extent; (E) Not at all.

How much disagreement, discord, or friction have you had with your *mother?*

(A) Very little; (B) Little; (C) Some; (D) Quite a bit; (E) A great deal.

To what extent was your mother irritated when she found your toys or clothing lying around?

(A) Usually very irritated; (B) Usually rather irritated; (C) Rarely irritated to any extent; (D) Does not apply; (E) Fluctuated.

Which statement best describes your marital status? (Select *one* choice from the 10 choices in this and the following question.)

(A) Neither going steady nor engaged; (B) Going steady or engaged; (C) Married less than 2 years; (D) Married 2 to 10 years; (E) Married 10 or more years.

(A) Remarried (Widowed); (B) Remarried (Divorced); (C) Separated; (D) Divorced; (E) Widowed.

How often do you polish your own shoes?

(A) Daily; (B) Once a week; (C) Twice a month; (D) Once a month; (E) Someone else does it.

To what extent do you enjoy viewing still life paintings?

(A) To a great extent; (B) To some extent; (C) To a small extent; (D) To a very small extent; (E) Not at all.

How often do you wonder what life in general is about?

(A) I never think about these things, it is sufficiently clear to me what life is all about; (B) I very rarely think about these things, mature people are more concerned with doing their jobs well; (C) Now and then I wonder about "life," but usually dismiss it rather readily because it is an unproductive area of thought; (D) Sometimes I ponder about these things, but I am not deeply concerned; (E) Sometimes I wonder what life is all about—where we are headed—what can it all mean—what is man doing here?

How accurately and honestly have you given your answers in completing this questionnaire?

(A) I have been as accurate and sincere as possible; (B) I have been quite accurate and sincere—I have answered most questions honestly; (C) I have not cooperated very much on this project—I have answered a number of questions inaccurately; (D) I concentrated more on speed of getting through than on accuracy and sincerity in my answers.

How did you feel about filling in a questionnaire such as this one?

(A) I enjoyed it; (B) It was interesting; I would enjoy a discussion with those who constructed it; (C) I found it somewhat interesting; (D) I found it neither interesting nor too distasteful; (E) It was a nuisance, and I resented it.

Fortunately, NASA reported that this project expired. It seems the Director of Personnel conducted a review of the research reports and determined that "the results were not conclusive enough to warrant operational use."

I am not surprised.

It is amazing to me that any federal agency feels it necessary to ask an applicant:

Whether he had diarrhea once a month or more;

Whether he believes in God;

Whether he has to urinate more often than others;

Whether he has been disappointed in love; or

Whether he dreams about sex matters.

Certainly, they can decide whether a person is a good secretary or clerk or writer without prying into such intimate matters.

"LIE DETECTORS"

I have found nothing in the Constitution which permits federal officials to strap an individual to a lie-detector machine and ask him:

When was the first time you had sexual relations with a woman?

How many times have you had sexual intercourse?

Have you ever engaged in homosexual activities?

Have you ever engaged in sexual activities with an animal?

When was the first time you had intercourse with your wife?

Did you have intercourse with her before you were married? How many times?



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Yet, it is done for the purpose of screening all applicants in two agencies, and for security clearance and ethical conduct cases in other agencies. In addition to my own investigation and experiences, I have found persuasive evidence about the use of machines from the hearings and reports of the House Government Operations Subcommittee chaired by Congressman John Moss. The lack of reliability and validity of lie-detectors is amply documented there. The lack of constitutionality is obvious. I should like to submit for the record additional comments on this subject.

[Speech, "Twentieth Century Witchcraft—The Lie-Detector," appears at completion of statement.]

I think the finding that some 28,000 lie-detector tests were given by 21 Federal agencies in one year is a dreadful commentary on the brand of administrative justice accorded applicants and employees.

I would heartily commend to you the conclusion of the House Committee that:

There is no "lie detector" neither machine nor human. People have been deceived by a myth that a metal box can detect truth or falsehood.

However, while I personally believe there is no excuse at all for subjecting an innocent citizen to such an ordeal, S. 1035 prevents such inquiry only with respect to a person's religious beliefs or practices, his personal relationship with members of his family, or his attitude or conduct with respect to sexual matters.

There is an exemption in section 6 for the CIA, NSA, and FBI if a personal finding is made with regard to each individual that the test or information is required to protect the national security.

Although these prohibitions will not halt all of the misuses of the lie-detector, it will limit the mass screening programs and require some gesture toward due process and a specific need for the information.

COERCION TO BUY BONDS AND MAKE DONATIONS

The right to spend or invest one's money as one sees fit is a basic freedom of any citizen and one which has been repeatedly denied Federal employees of the Executive branch.

They have been pressured and coerced unmercifully to invest in savings bonds and to donate to charities and causes of all kinds. Blacklisting, reprisals, denials of promotion, threats of loss of security clearances are only some of the tactics used. The Senate hearing record, report, and debates are full of such instances. It is not a passing problem, but one which gets worse with the years.

Regulations condemning such practices are useless when a supervisor is trying to please the Department head, and he in turn is trying to please the President.

We had a complaint, for example, from a Postal employee who said he just did not have the money, on his salary, to buy bonds. He was told that his office had a standing rule that no employee will be promoted or given an incentive award unless his record shows bond purchases. He wrote:

I had been pressured to the breaking point. I signed up for bonds. My morale is at its lowest ebb. Since I have a few years to go before retirement, I prefer my name not be given to the Postmaster because of possible repercussion.

That was two weeks ago.

Another employee writes of extensive pressures from administrators in the savings bond campaigns in the Veterans Administration. Employees were told of a quota system under which a bureau might not receive funding from the VA Central Office unless its participation in the bond drive was adequate. His letter reports the typical attitude of Federal officials about S. 1035, and I have heard it in so many cases. He writes:

People are afraid to speak up about this. As do others, I fear retaliation—it was only an abrupt remark: 'When the Ervin bill becomes *law, then* we'll follow it!' by our office that galvanized me into writing this letter to encourage you in your efforts. Many who up to this time have been either afraid or too brainwashed to stand up for their rights are very interested in the discussions in the press on your efforts for federal employees rights and passage of this legislation will encourage them to seek their own justice. I would appreciate anything you could send me on this that I could pass around to my co-workers.

Trusting your discretion (I wouldn't care to be identified), I remain—

PERSONAL FINANCIAL INQUIRIES

Another unwarranted invasion of privacy which S. 1035 specifically prohibits is the broad periodic inquiry into the details of an individual's personal finances and of members of his family. What civil servants do with their money, what debts they have, how much life insurance they own, where their property is located, what outside interests they have—these are none of the business of government.

Yet the government launched a program for wholesale disclosure requirement in an effort to prevent the appearance of conflict of interest and corruption in government. The questionnaires and the forms went far beyond the concerns of the conflict of interest laws.

This was a typical manipulation of the Civil Service for political ends.

This new program is designed to prevent conflict of interest and corruption in Government. To my mind, the 26 laws already on the books and the many regulations already governing ethical behavior, are sufficient, with the proper policing, to prevent any conflict of interest which such an invasion of privacy as this would disclose in the first place.

Aside from the invasion of privacy, and the fact that the Federal Government looks foolish, the expense of these program to the taxpayers is just so much money poured down the drain.

Dean Bayless Manning, of the Stanford University Law School, writing about conflict of interest issues for the *Federal Bar Journal* in 1964, expressed well the principle involved in many of the practices which this bill would limit. He commented:

In an orgy of virtue, we seem to lose our grip on decency. Confidence gives way to suspicion. . . . One may wonder whether the cause of Morality in government is furthered by a national psychology that would have demanded of President Washington that he dispose of Mount Vernon on the ground that issues involving slavery and tobacco might come up during his administration. The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public office is to treat them as men of dignity.

Needless to say, the cost of civil service morale is already reflected in frustration and indignation. I agree with the employee who writes:

I am in complete agreement with the objectives of the Standards of Conduct Directive and the Executive Order it purports to implement. I will continue to fully comply with these standards of conduct.

I strongly object, however, to the unwarranted invasion of my privacy resulting from the forced compliance with the requirement to submit a "Confidential Statement of Employment and Financial Interest."

This type of disclosure by Presidential Appointees and other high officials, when this is known to be a requirement of the job, is not an unreasonable requirement. However, wholesale application of this requirement to multitudes of lower level positions is either an act of no faith on the part of the Federal Government as an employer, or overzealousness on the part of an impersonal insensitive bureaucracy.

As many other employees are doing, I am completing the statement to avoid disobeying direct order. This in no way will change either my standards or my conduct.

Such a lack of faith in the integrity of employees opens to question the good faith and judgment of the employer.

The management philosophy underlying such policies will cause me and many others to re-examine the desirability of Defense Department and Federal employment.

Mr. Macy seems to have mistaken the entire point of the concern over the disclosure requirement. He has dictated some cut-back in the number of people who must reveal this data, and accorded them a right to appeal the decision that they must disclose. As employees have found, in order to appeal, they must prove they have no responsibilities. The threat of demotion hangs over their heads.

The Commission maintains there is no employee concern over the policy of subjecting civil servants, already stringently controlled, to such personal inquiries. I submit that if Mr. Macy would read some of the complaints from professional employees in high level positions, he would have a better feel for the people he is supposed to help manage.

No one in the Executive branch has listened. That is why Congress must.

That is why section 1(1) of S. 1035 prohibits requirements or requests of employees to disclose any items of his property, income, or other assets, source of income, or liabilities, or his personal or domestic expenditures or those of any member of his family or household. There is an exception for those employees who have authority to make any final determination with respect to tax or other liability to the Government, or claims which require expenditure of federal moneys.

The information required of these people is limited to possible conflict of interest situations.

Thus, the inquiry is given some semblance of due process overtones. Important agencies of the Federal Government have survived throughout our history by observing these principles in conflict of interest matters. I see no reason to depart from the Constitution at this juncture because a couple of political appointees might have had conflict of interest which embarrassed the Administration.

POLITICAL CONTRIBUTIONS

Another invasion of First Amendment freedoms of employees is illustrated in complaints of pressure from supervisors to buy tickets to political affairs, to work for local legislation in their communities, or attend meetings on political or economic programs of a political party. That is why S. 1035 specifically prohibits requests or requirements of an employee to support the nomination or election of anyone to public office through personal endeavor, financial contribution or any other thing of value. An employee may not be required or requested to attend any meeting held to promote or support the activities or undertakings of any political party in the United States.

The purpose of this section is to assure that the employee is free from any job-related pressures to conform his thoughts and attitudes and actions in political matters unrelated to his job to those of his supervisors. With respect to his superiors, it protects him in the privacy of his contribution or lack of contribution to the civic affairs and political life of his community, State and Nation. In particular, it protects him from commands or requests of his employer to buy tickets to fundraising functions or to attend such functions, to compile position papers or research material for political purposes, or make any other contribution which constitutes a political act or which places him in the position of publicly expressing his support or nonsupport of a party or candidate.



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Contrary to the allegation of some of the representatives of the Civil Service Commission and the Justice Department, who are seizing any straw to slow the passage of S. 1035, this language is quite consistent with the recently proposed revisions in the Hatch Act. Since it deals with unique situations, it should supplement and dovetail with that proposal, when it is eventually enacted. At any rate, I see no reason to avoid enactment of section 1(g) in the interest of further studying the Hatch Act, which has not prevented the complaints on which S. 1035 are based.

PRESENCE OF COUNSEL OR OTHER PERSON

Section 1(k) bans requirements or requests of employees under investigation for misconduct of any sort, to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests.

If criminal suspects are accorded a right to counsel in the early stages of an investigation and indeed, must even be notified of that right, then surely a law-abiding employee can be accorded the right to have a counsel or other person present if he wishes.

Without this guarantee, other rights will be meaningless. On this point I would refer you to the hearing record and the Senate report.

The merits of this clause are manifold; not least of which is that uniformity and order it will bring to the present crazy quilt practices of the various agencies concerning the right to counsel for employees facing disciplinary investigations or possible loss of security clearances tantamount to loss of employment. The Civil Service Commission regulations are silent on this critical issue. In the absence of any Commission initiative or standard, therefore, the employing agencies are pursuing widely disparate practices. To judge from the questionnaires and other evidence before the subcommittee, a few agencies appear to afford a legitimate right to counsel, probably many more do not, and still others prescribe a "right" on paper but hedge it in such a fashion as to discourage its exercise. Some apparently do not set any regulatory standard, but handle the problem on an ad hoc basis.

On a matter as critical as this, such a pointless diversity of practice is poor policy. So far as job-protection rights are concerned, all Federal employees should be equal.

While the courts have as yet had no occasion to articulate a specific right to counsel in the employment relationship, there can obviously be no doubt that the right to counsel is of such a fundamental character that it is among the essential ingredients of due process. What is at stake for an employee in a discharge proceeding—often including personal humiliation, obloquy and penury—is just as serious as that involved in a criminal trial. This is not to suggest that all the incidents of our civilized standard of a fair trial can or should be imported into Federal discharge proceedings. But if we are to have fair play for Federal employees, the right of counsel is a sine qua non.

The need for such protection was confirmed at the hearings by all representatives of Government employee organizations and unions.

Employees charged with no crime have been subjected to intensive interrogations by Defense Department investigators who ask intimate questions, make sweeping allegations, and threaten dire consequences unless consent is given to polygraph tests. They have been ordered to confess orally or to write and sign statements. Such interviews have been conducted after denial of the employee's request for presence of supervisor, counsel, or friend, and in several instances the interrogations have resulted in revocation of a security clearance, or denial of access to classified information by transfer or reassignment, with [illegible] of promotion opportunities.

Witnesses testified that employees have no recourse against the consequences of formal charges based on information and statements acquired during a preliminary investigation. This renders meaningless the distinction urged by the Civil Service Commission between formal and informal proceedings.

I am informed that the Internal Revenue Service which has a similar regulation has granted this right in 100% of the cases in which it was made.

Similarly, I am told, this has been included in union contracts through negotiations. Contrary to the tetsimony of the federal officials who have appeared here, I just do not believe this guarantee will disrupt any agency's work.

The protection for such a right is a policy judgment to be made by Congress, and there is no valid reason for denying it.

To those who claim S. 1035 should not be enacted because the remedies it provides are "strange" and "unusual," I say that these particular violations of individual rights are strange and unusual in a free society. In this day when courts so often engage in law-making and the exercise of powers they don't have, it is strange indeed that Congress must pass a law telling them to enforce individual rights and exercise powers they do have.

I urge the Subcommittee to approve S. 1035 favorably and urge its prompt enactment.

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TWENTIETH CENTURY WITCHCRAFT—THE LIE DETECTOR

(Address by U.S. Senator SAM J. ERVIN, JR. before the Greensboro Bar Association, Greensboro, N.C., on November 16, 1967)

I want to discuss with you tonight the constitutionality of the Federal Government's use of the polygraph on American citizens.

Throughout human history, from the dawn of civilization, men have sought to distinguish the real from the unreal, fact from fiction, truth from lies. As Cicero wrote "Our minds possess by nature an insatiable desire to know the truth."

It is to this end that men and societies have applied vast resources of intellect and strength to developing institutions and devices for divining the truth.

As lawyers, we are well aware of the ancient function of the jury to find the facts, to distinguish truth from untruth. And we know the dangers to a client's liberty of false evidence. We have seen the daily invention of new ingenious scientific and laboratory methods of judicial proof. So we are familiar with the laws of probability.

As citizens and as members of a profession which has a duty and obligation to pursue the truth and to facilitate other men's search for it, we have a special interest in some of the ways Federal officials seek truth.

The poet Keats said:

"Beauty is truth, truth beauty,
That is all—
Ye know on earth, and all ye need to know."

But man's search for truth is not always beautiful. In some agencies of the Federal Government, and elsewhere, man's desire to know all the truth from employees and applicants can be downright ugly.

I want to read you some typical complaints from law-abiding Americans who have encountered this device.

RECEIVED FROM AN APPLICANT AT THE NATIONAL SECURITY AGENCY

"When I graduated from college in 1965, I applied at National Security Agency. I went to 2 days of testing, which apparently I passed because the interviewer seemed pleased and he told me that they could always find a place for someone with my type of degree.

[illegible] months later I reported for a polygraph test at an office on Wisconsin Ave[illegible] of the National Security Agency at Fort [illegible]nue in the District or just over the District line in Maryland. I talked with the polygraph operator, a young man around 25 years of age. He explained how the machine worked, etc. He ran through some of the questions before he attached the wires to me. Some of the questions I can remember are—

'When was the first time you had sexual relations with a woman?

'How many times have you had sexual intercourse?

'Have you ever engaged in homosexual activities?

'Have you ever engaged in sexual activities with an animal?

'When was the first time you had intercourse with your wife?

'Did you have intercourse with her before you were married? How many times?

"He also asked questions about my parents, Communist activities, etc. I remember that I thought this thing was pretty outrageous, but the operator assured me that he asked everybody the same questions and he has heard all the answers before, it just didn't mean a thing to him. I wondered how he could ever get away with asking a girl those kind of questions.

"When I was finished, I felt as though I had been in a 15 round championship boxing match. I felt exhausted. I made up my mind then and there that I wouldn't take the job even if they wanted me to take it. Also, I concluded that I would never again apply for a job with the Government, especially where they make you take one of these tests."

RECEIVED FROM A FOREIGN SERVICE OFFICER

"I am now a Foreign Service Officer with the State Department and have been most favorably impressed with the Department's security measures.

"However, some years ago I was considered for employment by the CIA and in this connection had to take a polygraph test. I have never experienced a more humiliating situation, nor one which so totally violated both the legal and moral rights of the individual. In particular, I objected to the manner in which the person administering the test posed questions, drew subjective inferences and put my own moral beliefs up for justification. Suffice it to say that after a short time I was not a 'cooperative' subject, and the administrator said he couldn't make any sense from the polygraph and called in his superior, the 'deputy chief.'

"The deputy chief began in patronizing, reassuring tones to convince me that all he wanted was that I tell the truth. I then made a statement to the effect that I had gone to a Quaker school in Philadelphia, that I had been brought up at home and in school with certain moral beliefs and principles, that I had come to Washington from my University at the invitation of the CIA to apply for a position, not to have my statements of a personal and service nature questioned not only as to their truth but by implication as to their correctness, and that I strongly objected to the way this test was being administered.

"The deputy chief gave me a wise smile and leaning forward said, 'Would you prefer that we used the thumb screws?'(!) I was shocked at this type of reasoning, and responded that I hardly thought it was a question of either polygraph or the thumb screws.

"This incident almost ended the deep desire I had for service in the American government, but fortunately I turned to the Foreign Service. But if it happened to me it must have happened and be happening to hundreds of other applicants for various Federal positions."

RECEIVED FROM THE WIFE OF AN APPLICANT AT GENERAL SERVICES ADMINISTRATION

Her husband applied to the General Services Administration for a position as Operating Engineer. General Services Administration advised him that there was such a position open [illegible] Public Building Services



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Meade, Maryland. During an interview at the National Security Agency he was advised that the position required security clearance and was called upon to furnish normal security type information about himself. He provided all papers and information required.

Her husband was then directed to report to the National Security Agency for a polygraph test.

Many questions were asked of him before the polygraph was applied. The questions were of such a nature that he became angry, incised and emotionally upset. He was in this state when the polygraph was actually applied.

None of the questions asked were concerned with his loyalty to the United States, his religious beliefs or political affiliation. A number of questions asked pertained to his sex habits. Mr. ——— told his wife following the test that he felt too humiliated and so degraded by the questions and the manner in which they were placed by the operator that he didn't care whether or not he secured the position. He told his wife that if truth in answering the questions was the criteria he was fully confident he did pass the test. The polygraph operator told him at the time of testing that he, the operator, would determine the outcome of the test.

In an attempt to be 100% sure that an applicant or employee is not lying, officials of some agencies strap him to a lie-detector machine—a polygraph. They hook up wires and tubes to him which are supposed to register his respiration, blood pressure and pulse rate. Electrodes are attached to his hand to measure the "galvanic skin response"—the flow of electric current across his skin as sweating increases. When the subject is asked a series of questions, his physiological responses are recorded on a moving sheet of graph paper by three pens. This explains the name of this instrument, since "polygraph" was the Greek word for "many writings."

USE OF POLYGRAPHS INCREASING

This is no minor problem, for the use of the polygraph is increasing. From an investigative tool in law enforcement work, its use has been extended for other purposes into private and public employment. Although it was developed in 1921, only in the last 15 years have employers come to rely on the polygraph to test the honesty of employees already on the payroll. When labor unions began complaining that a man's failure to pass a polygraph was not a just cause for dismissal, many employers began using polygraphs to screen applicants instead, on the ground that these people had no way of challenging the instrument or the findings.

According to a recent estimate, approximately 3,000 polygraph operators are giving between two hundred thousand (200,000) and three hundred thousand (300,000) tests yearly in the United States.

In the Federal Government alone, a House Subcommittee found that 90 agencies gave 19,000 lie-detector tests in 1963. These figures did not include around 9,000 tests administered by the Central Intelligence Agency and the National Security Agency.

Proponents of polygraphs justify their use because of some findings and assumptions that:

Lying leads to conflict; conflict causes fear and anxiety; this emotional and mental state causes physical changes that can be accurately recorded and measured by the polygraph; and the operator by studying these reactions, can tell whether the subject is being deceptive or truthful.

The truth of the matter is, as the House Government Operations Committee recently reported:

"There is no 'lie detector,' neither machine nor human. People have been deceived by a myth that a metal box can detect truth or falsehood."

NORTH CAROLINA RULING

The Supreme Court of North Carolina in *State* v. *Foye*, 254 N. C. 704 (1961) listed a number of reasons for failure of the courts in this country to accept lie-detector evidence as a reliable and accurate means of ascertaining truth or deception. It found these overwhelming obstacles to acceptance of the polygraph, the court said, "notwithstanding its recognized utility in the field of discovery and investigation for uncovering clues and obtaining confessions."

In an article in the American Bar Association Journal several years ago, Professors Inbau and Reid defended the use of the polygraph. They frankly admitted, however, that only about 20 percent of the individuals who hold themselves out as examiners possess the training and skill required for competency in this field.

The attempt to transfer this investigative aid of law enforcement to the field of job suitability screening raises serious due process questions.

In standard criminal investigation, the polygraph examiner sets up a control question, in which he measures the subject's "guilt" response to a peccadillo, usually from childhood. This establishes a level of susceptibility against which can be measured the subject's response to the question at issue, which is the commission of a specific crime. In job suitability screening, there is no question at issue. All the questions are control questions and, thus, the examiner is measuring general sensitivity rather than specific guilt.

This is one reason the polygraph is an inappropriate tool for general suitability appraisal. Job applicants who fail the polygraph test may not be more "guilty" than those who pass, but only more sensitive. "Nervous" responses are more likely to be given by sensitive, introspective, vigorously honest persons. There is no correlation between these personality traits and the probability that the applicant might be corruptible. Some unreliable applicants might also give a "nervous" response, others not.

The whole process smacks of twentieth century witchcraft. Does the flesh of the applicant burn when a hot iron as applied to it? When tightly bound and thrown into a pond, does the applicant sink or float? When strapped in a chair with electrodes and other gadgets attached, does the rate of respiration and blood pressure of the applicant rise? Does the salt of his pores induce increased electrical conductivity? Are we reduced to alchemy as a technique of screening applicants for highly sensitive positions in the Federal bureaucracy?

The burden of proof should be on those who assert the efficacy of polygraph in predicting the behavior of prospective government employees.

There have been practically no efforts to compile this proof. Congressional hearings and reports as well as the professional literature on the subject show that there are neither statistics nor facts to prove the value of the polygraph in personnel work.

Nevertheless, even more sophisticated devices are being planned. For instance, we recently discovered that under government research contract, primarily through the Defense Department funds, private companies have developed a lie detector in the form of an innocent looking office chair—"a wiggle seat." This, of course, is to get around all of those opponents who say an applicant's body and mind react when all those electrodes are attached to him.

An article in the Science News Letter describes this device: "When an individual is seated in the chair, the forces exerted by the pumping action of his heart are sensed, changed from mechanical to electrical energy, then broadcast to remove recording instruments. An individual weighing less than 140 pounds will not generate enough energy

nal. Since the chair so closely resembles an ordinary chair, the heart data can be obtained without the conscious knowledge of the subject."

A commercial brochure on the chair proclaims: "Nothing intrudes on the serenity of the setting. The patient does not see, much less 'wear' an electrode—straps and wires are prominent only by their absence. He or she remains fully clothed throughout the brief examination. . . . Mere hand contact with the arm electrodes is sufficient to obtain a good record. . . . A microphone in the dorsal position senses vibro- and phonocardiographic information."

While the medical uses of such instruments can be of great value, their potential for denial of basic rights to unsuspecting applicants and employees cannot be overestimated.

Legislatures in six states and several city councils have already outlawed lie detectors in the employment relations; in some instances, unions have forced their elimination through collective bargaining.

FBI Director Hoover, fortunately for our security, does not use them for personnel work.

The Warren Commission report stated:

". . . In evaluating the polygraph, due consideration must be given to the fact that a physiological response may be caused by factors other than deception, such as fear, anxiety, neurosis, dislike and other emotions. There are no valid statistics as to the reliability of the polygraph . . ."

Why then, do administrators have such blind faith in these devices? In my opinion, it is directly related to the role of science and technology in our society—to the cult of "the expert." There is an increasing belief that anything scientific must be more reliable and rational than the judgment of men. Unfortunately, this is true not only of officials who favor the lie-detector machine; it is also true of the average person who is subjected to it. Officials have admitted that its greatest use is in scaring the individual into admitting his transgressions.

There is a growing belief that the machine can bridge that credibility gap which must exist wherever fallible men choose between truth and untruth.

But I submit that this gap is a risk which must be taken in a free society. We cannot afford to dismiss the human element in decision-making where basic liberties are at stake.

There are workable alternatives to lie detectors. At the disposal of the Federal Government is a great investigative apparatus for checking references, background and qualification of applicants. Vast sums are spent training personnel specialists how to evaluate an individual's understanding of his role in an organization or agency.

Which brings me to the second point I want to make about the polygraphs.

Even if they could be proved 100% reliable and valid, there is no necessity for these infringements of freedom and invasions of privacy; but even if there were a necessity for them, I believe every citizen should answer with William Pitt:

"Necessity is the plea for every infringement of human liberty. It is the argument of tyrants; it is the creed of slaves."

Why should an applicant or employee have to describe his religious beliefs and practices? As long as his record shows that his conduct is socially and legally acceptable, why should he have to tell a prospective Federal employer about his sexual attitudes and conduct; or whether he loved his mother; or whether he fights with his wife?

Is there not a part of his personality, of his private life, which can and should be immune from governmental trespass?

By questionable means, we are perhaps seeking truthful answers to questions which should not be asked. I think we should ask [illegible] sanctioning these



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privacy invasions, we are not trifling with the great constitutional truths which buttress our society. I believe we are.

Regrettably, it would appear that we have come far from the nature of the truths which we once thought important; but in the case of the polygraph, we have come not very far at all from the ancient methods of seeking the truth. It is not too far from the ancient trial of ordeal by fire or water to the concept of the "wiggle seat." Nor is there much difference between the polygraph and the old deception test used by the Indians. They thought that fear inhibited the secretion of saliva. To test his credibility, an accused was given rice to chew. If he could spit it out he was considered innocent; but if it stuck to his gums he was judged guilty.

What do polygraph techniques do to the concepts underlying the Fourth and Fifth Amendments? To the principles that there shall be no search and seizure without warrant, and that no man should be compelled to incriminate himself? Is there anything more destructive to our system of government than attempting to seize a man's innermost thoughts; compelling him to confess his beliefs, his religious practices, his every sin; requiring him to bare his soul to a machine in order to hold a job?

Hardened criminals are safeguarded in this area of the law, yet an applicant for Federal employment is not.

In the employment process, however, it is to the First Amendment that this twentieth century witchcraft does the most violence. That Amendment guarantees a citizen freedom from interference with his freedom of expression in his thoughts and beliefs. And it includes not only his right to express them but his right to keep silent about them. This is a crucial issue in a free society.

To condition a citizen's employment and his future job prospects on his submission to the pumping of his mind, his thoughts, and beliefs about personal matters unrelated to his duties, is to exercise a form of tyranny and control over his mind which is alien to a society of free men. It is to force conformity of his thought, speech and action to whatever subjective standards for conduct and thought might be held by a polygraph operator, or his company, or an agency official. It is to weaken the fabric of our entire society.

I submit that the Constitution can and does protect us from such incursions on our liberties.

EMPLOYMENT AS A PRIVILEGE

To say that employment is a privilege is to avoid the issue. For, as the Supreme Court has said, it does not matter whether or not there is a constitutional right to employment. The means and procedures employed by government should not be arbitrary.

CONSENT

Nor does it help to reply that a person "consents" to such an invasion of his liberty. Where the full force of government is behind the request, where he knows that great computer and data systems of government will retain forever his refusal to reply, or his answers to the queries, there is no free consent.

CONFIDENTIALITY OF RECORDS

Proponents argue that the records are confidential. It is no secret that his employment records, with all of the medical and security data, follow a man throughout his career. They are officially transmitted through the subterranean passages of our complex bureaucracy.

It was to prevent the practice of such tyrannies on Federal employees that I introduced my bill, S. 1035.

This bill is premised on the belief that just because he goes to work for government, the individual does not surrender his basic rights and liberties as a citizen. Nor does he surrender his right to a proper respect by his government for his privacy and other rights.

[illegible] is designed to prohibit unwarranted governmental invasions of employee privacy and is sponsored by 55 Members of the Senate. I am happy to report that it was approved by the Senate on September 13 by a vote of 79 to 4.

Section (f) of S. 1035 makes it unlawful for any officer of any Executive department or agency to require or request, or attempt to require or request, any civilian employee serving in the department or agency, or any person applying for employment in the Executive branch of the United States Government "to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters."

This measure is now pending in a Subcommittee of the House Post Office and Civil Service Committee under the Chairmanship of Congressman David Henderson. I am hopeful that the Congress will enact it promptly.

It is time we put a rein on the Federal Government's use of twentieth century witchcraft to find the truth. It is time the Federal Government was told what truths it should be seeking.

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MEMORANDA CONCERNING THE EFFECT S. 1035 ON THE SECURITY AGENCIES

THE LIBRARY OF CONGRESS,
*Washington, D.C., January 29, 1968.*

To: Senate Subcommittee on Constitutional Rights.
From: American Law Division.
Subject: Effect of S. 1035 on C.I.A. Secrecy.

This is in response to your request for a consideration of the possible effects of S. 1035, to protect the privacy of governmental employees, upon the secrecy of an organization like the Central Intelligence Agency.

A number of statutory provisions are designed to allow the C.I.A. to maintain almost absolute secrecy about its operations and personnel. In 50 U.S.C. § 403(d)(3), the Director of C.I.A. is authorized, *inter alia*, to protect intelligence sources and methods from unauthorized disclosure. The Agency is exempted by 50 U.S.C. § 403g from the provisions of any law requiring the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by it. The Director is authorized, by 50 U.S.C. § 403(c), in his discretion, to terminate the employment of any officer or employee of the Agency whenever he deems it necessary or advisable in the interests of the United States.

Additionally, a series of criminal statutes prohibit unlawful disclosure of confidential information respecting the national defense. 18 U.S.C. §§ 793, 794, 798, 1905. And, finally, it appears that the C.I.A. requires of most if not all of their employees the execution of a secrecy agreement under which the employee swears to maintain in confidence information gained because of his employment and under which it is specifically recognized that an intentional or negligent violation of the agreement might subject the employee to prosecution under at least 18 U.S.C. §§ 793 and 794. See, *Heine* v. *Raus*, 261 F. Supp. 570, 571–572 (D.C.D.Md. 1966).

It is, of course, a rule of statutory construction that when two statutes conflict, the one later in date will govern. Therefore, if any provision of S. 1035, upon enactment, conflicts with any provision of the statutes listed above, S. 1035 would prevail. Would there be any conflict?

In order to protect the privacy of government employees, S. 1035 prohibits those in authority from engaging in certain activities in regard to government employees. The prohibited activities are (1) requiring the disclosure of one's race, religion, or national origin or that of his forebears, (2) indi[illegible] assemblage for the purpose of advising, instructing, or indoctrinating in the performance of or in regard to anything other than official duties will be noticed or acted upon, (3) requiring one to participate in activities or undertaking not relating to official duties, (4) requiring one to report on his activities or undertakings not related to his official duties, (5) requiring one to submit to any interrogation or examination designed to elicit information concerning such personal matters as relationships to other people, religious beliefs or practices in sexual matters, (6) requiring the taking of a polygraph test designed to elicit such personal information, (7) requiring one to participate in any way in the support of any person for political office of any political party, (8) requiring one to invest one's money in bonds or other obligations, (9) requiring one to disclose personal finances except in certain conflict of interest situations, (10) requiring or requesting one to participate in any investigation which could have disciplinary consequences without the presence of counsel or other persons of his choice, (11) and discharging or otherwise discriminating against one because of a refusal to comply with a request or demand made illegal by the bill.

Certain provisions of the bill recognize the existence of security interests necessitating deviation from the provisions of the bill. For example, a proviso permits inquiry into the national origin of an employee when deemed necessary or advisable to determine suitability for assignment to activities or undertaking related to the national security of the United States or to activities or undertakings of any nature outside the United States.

And Section 6 of the bill permits the requiring of polygraphing, personality testing or financial inquiry to elicit otherwise impermissible personal information of any employee of the C.I.A., the National Security Agency or the F.B.I. if the Director of the appropriate agency, or his designee, makes a personal finding with regard to each individual to be tested that such test is required to protect the national security.

Enforcement of the act would be placed in a Board of Employee Rights and hence to federal district court.

It appears then that the issue in any matter taken to the Board and to court subsequently would be whether some prohibition of the act had been violated. That is, the only relevant issue to be adjudicated would be whether, for example, someone had been requested or forced to take a polygraph test in regard to his sexual activities and had, perhaps, been discriminated against, by being fired, demoted, or somehow been retaliated against. Thus, it is difficult to see how an issue involving government secrets could be relevant to any determination the Board or court might be called up to make. One possibility might arise should the assignment of an operative be made to attend some assemblage or to take part in some activity be made and refused, for which refusal disciplinary action might follow.

It could be claimed by the affected employee that the requirement violated one or another provision of the act. But it will be noted that such assignments would violate the act only if not part of an employee's "official duties." Should determination of a possible violation depend upon whether or not the assignment involved "official duties," the precedents seem clear that to avoid disclosure of confidential or secret information a court will accept the certification by the Agency head to that effect. *Heine* v. *Raus*, supra 577–78; and, see *United States* v. *Reynolds*, 345 U.S. 1 (1953).

Thus, it would seem that issues involving governmental secrecy would not be relevant to issues before the Board and to a subse[illegible] would turn rather



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upon whether specific provisions of S. 1035 had been violated.

In regard to the question of any conflict between present statutes and the proposed act, it appears that in all but one instance no conflict would occur. That instance arises with regard to 50 U.S.C. § 403(c), permitting the Director to terminate the employment of any employee or officer in his discretion. Under S. 1035, it would seem that the Director could not terminate employment for a refusal to carry out any request to do anything prohibited by the bill. He could not, for example, fire anyone for refusing to buy U.S. savings bonds. But, as has been noted, the issue would be simply whether this violation was the cause of dismissal or not; no secrets or confidences, no disclosure of any other reason, would have to be made known.

And, as already noted, there are exemptions. The Director may make inquiry of all sorts of personal information if he makes a finding that security requires it. No disclosure would be required of the reason for such a finding, if it became an issue before the Board, only disclosure that the finding had in fact been made.

In short, it appears that enactment of S. 1035 would create no conflict with present statutes nor change any of them, with the limited exception noted above.

JOHNNY H. KILLIAN,
*Legislative Attorney.*

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COMMENTS BY SENATOR ERVIN: WHY THE CIA AND NSA SHOULD NOT BE EXCLUDED FROM THE PROVISIONS OF S. 1035, THE BILL TO PROTECT EMPLOYEE RIGHTS

The Central Intelligence Agency and the National Security Agency have asked that the guarantees in S. 1035 not be extended to their employees or to citizens who apply for employment with those agencies.

I see no practical or policy reasons for granting this request, and find no constitutional grounds for it. It is neither necessary nor reasonable.

The men who drafted the Constitution envisioned a government of laws, not of men. They meant that wherever our national boundaries should reach, there the controls established in the Constitution should apply to the actions of government. The guarantees of the amendments hammered out in the state constitutional conventions and in the meetings of the First Congress had no limitations. They were meant to apply to all Americans; not to all Americans with the exception of those employed by the Central Intelligence Agency and the National Security Agency.

My research has revealed no language in our Constitution which envisions enclaves in Washington, Langley, or Fort Meade, where no law governs the rights of citizens except that of the Director of an agency. Nor have I found any decision of the highest court in the land to support such a proposition.

Why, then, do these agencies want to be exempt from this bill?

Is it that, unbeknown to Congress, their mission is such that they must be able to order their employees to go out and lobby in their communities for open-housing legislation or take part in Great Society poverty programs?

Must they order them to go out and support organizations, paint fences, and hand out grass seeds, and then to come back and tell their supervisors what they did in their spare time and with their weekends?

Do they have occasion to require their employees to go out and work for the nomination or election of candidates for public office? Must they order them to attend meetings and fund-raising dinners for political parties in the United States?

Do they not know how to evaluate a secretary for employment without asking her how her bowels are, if she has diarrhea, if she loved her mother, if she goes to church every week, if she believes in God, if she believes in the second coming of Christ, if her sex life is satisfactory, if she has to urinate more often than other people, what she dreams about, and many other extraneous matters?

Why do these two agencies want the license to coerce their employees to contribute to charity and to buy bonds? The Subcommittee has received fearful telephone calls from employees stating that they were told their security clearances would be in jeopardy if they were not buying bonds, because it was an indication of their lack of patriotism.

Why should Congress grant these agencies the right to spend thousands of dollars to go around the country recruiting on college campuses, and the right to strap young applicants to machines and ask them questions about their family, and personal lives such as:

"When was the first time you had sexual relations with a woman?

"How many times have you had sexual intercourse?

"Have you ever engaged in homosexual activities?

"Have you ever engaged in sexual activities with an animal?

"When was the first time you had intercourse with your wife?

"Did you have intercourse with her before you were married?

"How many times?"

What an introduction to American government for these young people!

The Subcommittee has also received comments from a number of professors indicating the concern on their faculties that their students were being subjected to such practices.

That we are losing the talent of many qualified people who would otherwise choose to serve their government is illustrated by the following letter which was received by Representative Cornelius Gallagher, Chairman of the Special House Government Operations Committee investigation of invasions of privacy:

"I am now a Foreign Service Officer with the State Department and have been most favorably impressed with the Department's security measures.

"However, some years ago I was considered for employment by the CIA and in this connection had to take a polygraph test. I have never experienced a more humiliating situation, nor one which so totally violated both the legal and moral rights of the individual. In particular, I objected to the manner in which the person administering the test posed questions, drew subjective inferences and put my own moral beliefs up for justification. Suffice it to say that after a short time I was not a 'cooperative' subject, and the administrator said he couldn't make any sense from the polygraph and called in his superior, the 'deputy chief.'

"The deputy chief began in patronizing, reassuring tones to convince me that all he wanted was that I tell the truth. I then made a statement to the effect that I had gone to a Quaker school in Philadelphia, that I had been brought up at home and in school with certain moral beliefs and principles, that I had come to Washington from my University at the invitation of the CIA to apply for a position, not to have my statements of a personal and serious nature questioned not only as to their truth but by implication as to their correctness, and that I strongly objected to the way this test was being administered.

"The deputy chief gave me a wise smile and leaning forward said, 'Would you prefer that we used the thumb screws?' (!) I was shocked at this type of reasoning, and responded that I hardly thought it was a question of either polygraph or the thumb screws.

"This incident almost ended the deep desire I had for service in the American government, but fortunately I turned to the Foreign Service. But if it happened to me it must have happened and be happening to hundreds of other applicants for various Federal positions."

On the subject of polygraphs, the AFL-CIO in 1965 stated:

"The AFL-CIO Executive Council deplores the use of so-called 'lie detectors' in public and private employment. We object to the use of these devices, not only because their claims to reliability are dubious but because they infringe on the fundamental rights of American citizens to personal privacy. Neither the government nor private employers should be permitted to engage in this sort of police state surveillance of the lives of individual citizens."

Legislatures in 5 States and several cities have already outlawed these devices, and many unions have forced their elimination through collective bargaining. The Director of the Federal Bureau of Investigation has said they are unreliable for personnel purposes.

Why should Congress take a step backward by specifically authorizing their continued use on American citizens in these two agencies to ask about their sex lives, their religion, and their family relationships?

Bear in mind that, reprehensible as these lie detectors are, the bill only limits their use in certain areas, and the Director may still authorize their use if he thinks it necessary to protect the national security. Personally, I fear for the national security if its protection depends on the use of such devices.

Similarly, the question may be asked, why should these agencies force their employees to disclose all of their and their families' assets, creditors, personal and real property, unless they are responsible for handling money? Nevertheless, under the bill, the CIA and NSA have been granted the exemption they wished, to require their employees to disclose such information, if the Director says it is necessary to protect the national security. What more do they want?

Apparently, what they want is to stand above the law.

Taken all together, their arguments for complete exemption suggest only one conclusion—that they want the unmitigated right to kick Federal employees around, deny them respect for individual privacy and the basic rights which belong to every American regardless of the mission of his agency.

The idea that any government agency is entitled to the "total man" and to knowledge and control of all the details of his personal and community life unrelated to his employment or to law enforcement is more appropriate for totalitarian countries than for a society of free men. The basic premise of S. 1035 is that a man who works for the Federal government sells his services, not his soul.

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REPLIES TO CENTRAL INTELLIGENCE AGENCY OBJECTIONS TO S. 1035, A BILL TO PROTECT THE RIGHTS OF FEDERAL EMPLOYEES

The Central Intelligence Agency, in a report which was stamped "secret," stated a number of objections to this bill. At the request of CIA representatives these were also explained to me at length in personal discussions. Their suggestions were carefully considered in Committee and the bill was carefully redrafted and amended to meet them. I believe the agency now has no legitimate complaint other than their natural lack of enthusiasm about being subject to any law. Following is a summary of their objections and the provisions in S. 1035 which meet them. I believe the same arguments will apply to other security positions in the Defense Department. Where those positions are not covered, the Subcommittee must make a policy decision that, subject as [illegible] regulations, they



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should not be accorded any exemptions. The extent of their wrongs is so amply documented that I believe they deserve no exemption.

*They state they have no interest in the race or religion of an applicant, but must inquire into his national origin and that of his forebears for purposes of his suitability for foreign assignment.*

Section 1 (a) provides that nothing therein shall be construed to prohibit inquiry concerning the national origin of the employee when this is deemed necessary or desirable to determine suitability for assignment to activities or undertakings related to the national security within the United States or to activities or undertakings of any nature outside the United States.

There is nothing in section 1(a) which would prevent the agency from asking a person if he has relatives in a foreign country.

*They state that they could not take notice of the activities of their employees in "notorious and controversial assemblages which will bring them to the general public attention and thus destroy their usefulness to the degree that it will destroy their anonymity." They also believe they could not take notice of participation in communist meetings.*

Section 1(b) does not apply if the activity is related to official duties of the employee: this includes those to which he is or may be assigned. Since the entire mission of the CIA is directed to preservation of the national security, certainly, nothing in Section 1(b) would preclude taking notice of participation in activities, communist and otherwise, in conflict with official duties or in violation of the law, and thus inconsistent with the security functions of the agency.

*They say that section 1(c) would prohibit them from telling employees overseas to participate in activities whose relation to the job may not be apparent to the employee; and that they might not wish to tell the employee of the relationship in order to preserve the naturalness of his participation.*

This argument is so patently specious as to require no reply. The section does not apply to activities and undertakings related to the performance of official duties to which the employee is or may be assigned.

I find it difficult to believe that employees of the Central Intelligence Agency are so disaffected, so poorly trained, so unresponsive to official commands on the job as to bring a law suit every time they are given an official assignment.

*They fear that section 1(d) will prevent requirements that employees keep the Agency informed concerning their speaking engagements and proposed publications, as well as concerning their personal relationships with foreign diplomats or "any other unusual associations which may have security implications," or any brushes with the law.*

Again, it is clear that the exceptions in Section 1(d) would meet these objections since, generally, these are matters relating to the mission of the agency and to the ability and capacity of the employee to discharge his security mission. Section 1(d) does not apply to the reports concerning activities or undertakings related to official duties or when there is reason to believe the employee is engaged in outside activities or employment in conflict with his official duties. I believe this revision in the bill is more than adequate to meet the needs of the agency.

*The Agency objected to Section 1(e) of the original bill prohibiting orders to employees not to patronize business establishments offering goods and services to the general public.*

This section was deleted to meet their objection, even though there was a need for it to protect all other employees from paternalistic or officious direction of their outside activities.

*They objected to Section 1(f) on the ground that it would prohibit their psychological testing of applicants and employees.* (This is now section 1(e))

Although it probably should do this, the bill did nothing of the sort. There are many, many varieties of psychological tests, and I am sure the expert psychologists employed by the Agency are aware of them. This section originally limited their use of one type of test to ask questions about three areas—religion, sex, and personal family relationships.

Now, by the Committee amendment, they can even ask about those matters if the Director thinks it is necessary for national security purposes. A floor amendment allows his designee to make this finding.

They can ask about anything else under the sun.

*They object to the Section which would limit the use of polygraphs in three respects—sex, religion, and personal family relationships.*

They are limited in only these three areas and they can ask about anything else. Under the Committee amendment, they may even ask questions in these three areas when the Director believes it is necessary for national security purposes. By the floor amendment, the Director's designee may make this finding.

*They have no objection to the ban on requirements to make political contributions.*

*They have no objection to the ban on coercion of employees to buy bonds and contribute to charity.*

*They object to the limited ban on requirements to disclose personal assets, creditors, and liabilities of employees and members of their families.*

This does not apply to an employee who has authority to make final determinations concerning expenditures of money. By a Committee amendment they may even do this where it is necessary for national security purposes. A floor amendment allows the finding to be made by the Director's designee.

*They object to the Section giving an employee the right, if he requests it, to have a counsel or other person present during an interrogation which could lead to disciplinary action.*

This is obviously a specious objection since I doubt that their employees are going to request a lawyer for every interview with their supervisor concerning their work. There are ample summary dismissal powers already accorded the agency by Congress and these are sufficient to meet any security needs of the agency. In addition, there are numerous statutes governing protection of government information.

## ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

## THE PRESIDENT'S APPOINTMENTS TO THE SUPREME COURT

Mr. BROOKE. Mr. President, on Thursday, June 27, the Boston Herald traveler commented editorially upon the President's recent decision to appoint Abe Fortas as Chief Justice of the Supreme Court and Homer Thornberry as Associate Justice. I believe the editorial is a worthy contribution to the dialog which has taken place regarding these appointments, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

FORTAS AND THORNBERRY

In nominating a new Chief Justice and Associate Justice to the U.S. Supreme Court, President Johnson has served history as well as friendship. While both Abe Fortas and Homer Thornberry have enjoyed long and close associations with the President, both also—Fortas especially—bring more than friendship to their new appointments. Moreover, Fortas would become the first Jewish Chief Justice and only the third to be promoted from within the Court.

Justice Fortas' credentials are of the first order. Before joining the Court in 1965, he fashioned an outstanding career as a lawyer, handling several controversial and unpopular cases and building a reputation as a champion of individual liberties and equal protection under the law for all. His service on the Court has not diminished that reputation. Other lawyers regard him as brilliant, articulate, a perfectionist.

Considered generally part of the liberal element within the Supreme Court, Justice Fortas obviously would not be the first choice as Chief Justice of those who have been critical of the Court under Earl Warren. But their criticism of Justice Fortas has been tempered by his obvious devotion to the law and his condemnation of those who would go beyond it.

In an address in Boston in 1965, Justice Fortas said: "We must establish, without exception, the rule of law. We cannot tolerate lawlessness or the conditions which bring it about." Recently he spoke out against certain of the student actions at Columbia University. On another occasion he said: "The advocacy of civil rights does not require or justify the abandonment of all decency." He has advocated adequate education, training, employment, recreation and discipline to prevent the young from growing into lawbreakers.

Justice Fortas does not see the Supreme Court as an aloof entity handing down arbitary decisions, but as a force very much involved in the mainstream of American development. "Law is a profession dealing with human beings, not an automated business," he has said. His respect for the law blends with a respect for human dignity.

If President Johnson's nominations are confirmed, the essential character of the Warren Court is likely to be preserved, for Judge Thornberry, too, is regarded as a liberal. But as a Southerner, he should be more acceptable at least to those critics of the Court who are from the South. Thornberry is, of course, less well known than Justice Fortas, but he would come to his new post with five years of judicial experience and 15 years of legislative experience in the U.S. House. It was President John F. Kennedy who appointed him a federal district judge in 1963, from which position he was elevated to the appeals court in 1965.

From the standpoint of merit, then, the Senate would have difficulty finding cause to reject Mr. Johnson's nominees. And, while some discontent is still being voiced in the Senate about the practice of having crucial vacancies in the judiciary filled by a lame-duck President, it is doubtful that any organized move to block the appointments on these grounds will be mounted.

Herbert Hoover and every President since him, with the exception of Mr. Kennedy, has named a Chief Justice. Mr. Johnson, up to yesterday, had made only two appointments



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